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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JAN KRC,

Petitioner,

v.

UNITED STATES INFORMATION AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the two decisions of the court of appeals in this case are in such conflict as to call for an exercise of this Court's power of supervision, where the first decision denied petitioner relief on the ground that he was not separated from the Foreign Service for conduct-related reasons, and the second decision denied petitioner relief on the ground that he was separated from the Foreign Service for conduct-related reasons.

2. Whether a homosexual employee of the United States Information Agency whose job performance is excellent, who tailors his conduct to comply with all applicable laws and agency regulations, who is found by the Foreign Service Grievance Board not to have engaged in misconduct or to have shown poor judgment, and who comes forward with evidence that his employer imposes disparate employment restrictions based on sexual orientation, is entitled to a trial on his claim that his separation from the Foreign Service violated the equal protection clause.

3. Whether the court of appeals erred in affirming the dismissal of petitioner's claims under the due process clause, the Foreign Service Act, and the Administrative Procedure Act, and in setting aside a decision of the Foreign Service Grievance Board ordering that petitioner be reinstated to his Foreign Service position.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jan Krc, a homosexual former employee of the United States Information Agency ('USIA'), petitions the Court for a writ of certiorari to review the judgments rendered in this case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App. 5a-34a and 35a-54a) are reported at 989 F.2d 1211 and 905 F.2d 389. The opinions of the district court (App. 55a-91a) and the

Foreign Service Grievance Board (App. 92a-119a) are not reported.

JURISDICTION

The most recent opinion of the court of appeals was filed on April 9, 1993. Krc filed a timely petition for rehearing and suggestion for rehearing *en banc* on May 21, 1993, which were denied in orders filed July 23, 1993 (App. 1a-4a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (Supp. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, statutes, and regulations principally involved in this case are the United States Constitution, Amendment V; the Foreign Service Act of 1980, 22 U.S.C. §§ 3905, 4010, 4011, 4131; the Administrative Procedure Act, 5 U.S.C. §§ 701, 706, and the Foreign Service Manual, 3 F.A.M. § 622.9. The pertinent text of those provisions is set forth in the appendix.

STATEMENT

A. Introduction and Overview

In March 1987, after a trial-type hearing, the Foreign Service Grievance Board ('FSGB') ordered that petitioner Jan Krc be restored to his position as a Foreign Service officer candidate with respondent, the United States Information Agency ('USIA'). Krc had been dismissed from the Foreign Service in 1985 when the USIA Office of Security asserted that Krc's homosexuality and alleged misconduct made him 'an intolerable security risk.'

The FSGB exonerated Krc on all misconduct charges. In addition, because Krc made no secret of his sexual

orientation, the FSGB found no rational basis for the assertion that Krc presented an intolerable security risk. Indeed, Krc's ability to protect classified information was acknowledged by USIA, which in 1985 had reappointed Krc to its civil service and had allowed Krc to retain his security clearance.[1/]

USIA sought judicial review of the FSGB's order in June 1987, contending that the FSGB lacked jurisdiction of the matter. Krc counterclaimed for enforcement of the FSGB's order. In addition, Krc pleaded statutory and constitutional counterclaims in order to preserve his right to judicial review in the event that USIA's jurisdictional attack on the FSGB's decision were upheld. In particular, Krc alleged that his termination from the Foreign Service violated the Foreign Service Act, the Administrative Procedure Act, and the equal protection clause, and deprived him of interests in liberty and property without due process of law.

The lower courts ultimately sided against Krc on all issues.

B. The Underlying Facts

Krc was born in Czechoslovakia in 1956, immigrated to this country with his parents in 1967, and became a U.S. citizen in 1973. After graduating from Wesleyan University in 1979 and earning a masters degree at the Fletcher School

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[1/]Krc remained a civil-service employee of USIA until October 1993. During this litigation, he successfully reapplied to the Foreign Service and was officially enrolled as a Foreign Service officer candidate by the Department of State on October 18, 1993. That development does not moot this case, of course, because (among other things) Krc continues to seek reinstatement to his Foreign Service position at USIA as well as the other career-related relief that was awarded to him by the FSGB.

of Law and Diplomacy in 1981, Krc was hired as a Foreign Service 'officer candidate' in September 1982.[2/]

Krc's first overseas posting in the Foreign Service was to Belgrade, Yugoslavia, for the period from September 1983 through July 1984. His job performance there was 'uniformly excellent,' as USIA stipulated at the subsequent grievance proceeding. Although the agency received certain classified information concerning Krc during the midst of his tour in Yugoslavia, the information did not cause USIA to change Krc's assignment.[3/]

Krc's Yugoslavia assignment came to a routine conclusion in July 1984. He then returned to USIA's headquarters in Washington, D.C., where in August 1984 he was questioned for the first time by USIA about his sexual orientation. According to the testimony of the agency security officer who conducted that interview, Krc was 'candid and truthful' in all respects, and forthrightly acknowledged that he was homosexual. This acknowledgement of Krc's sexual orientation caused the security officer to caution Krc that he was giving 'testimony against interest' that 'could subject him to adverse action.' Krc was then questioned at length about his homosexual

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[2/]The Foreign Service is a specialized personnel system governed by the Foreign Service Act, 22 U.S.C. § 3901 *et seq.* Its members are selected through an intensely competitive selection process and are then employed by such agencies as the Department of State, the Department of Commerce, the Department of Agriculture, and USIA. Officer candidates have at most five years in which to qualify for tenure and thus become career Foreign Service Officers ("FSOs"). *See* 22 U.S.C. §§ 3941(d)(1), 3949(a).

[3/]The classified information may not and need not be disclosed here. When it was brought to Krc's attention in early 1984, U.S. Embassy officials in Belgrade assured Krc that the information did not reflect adversely upon him in any way, and probably related to the fact that he had been born in Czechoslovakia. USIA's security director testified during the grievance proceeding that USIA would not have taken any action against Krc based on the classified information itself.

conduct, particularly his relations with other Foreign Service officers ('FSOs'). Krc stated that he had engaged in several brief sexual relationships while he was stationed in Yugoslavia, including three with foreign nationals.

Based solely on Krc's statements during the August 1984 debriefing, USIA's Security Office leaped to the conclusion that Krc had violated an agency policy concerning fraternization with foreign nationals. On October 3, 1984, Krc was notified that USIA intended to terminate his Foreign Service appointment for 'misconduct' based upon his alleged violation of that policy. This proposal was withdrawn, however, on December 11, 1984, when Krc demonstrated to the director of USIA's Office of Personnel that the fraternization policy for Yugoslavia differed radically from other such policies for Eastern Europe and that the policy communicated to him did not prohibit casual sexual relations with foreign nationals.[4/]

When the separation proposal was withdrawn, Krc bid on and was selected for a posting to the Philippines (one of the many countries in the world where homosexual conduct is lawful). On January 11, 1985, however, the director of USIA's Security Office advised USIA's Personnel Office by memorandum that he considered Krc to pose 'an intolerable security risk' and thus would not approve Krc for a posting to the Philippines or any other overseas location. The January 11, 1985, memorandum asserted that Krc had shown 'poor judgment and lack of discretion' by engaging in homosexual conduct in Yugoslavia. (On deposition, the security director explained that this assertion about Krc's 'poor judgment and lack of discretion' was based upon the security director's belief that homosexual conduct was illegal

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[4/]Indeed, Krc pointed out that the Yugoslavia fraternization policy expressly permitted "dating" between FSOs and Yugoslav nationals, and that several of his Foreign Service colleagues in Belgrade had actually married Yugoslav nationals.

in Yugoslavia and his further belief that Krc had violated the Yugoslavia fraternization policy.) In addition, the January 11, 1985, memorandum asserted that Krc's 'homosexuality' made him 'an extremely likely target for hostile intelligence approaches,' and it observed that homosexual conduct was illegal in approximately 70 countries.[5/]

Two weeks later, USIA's Personnel Office advised Krc that, because the Office of Security refused to approve him for any overseas postings, his Foreign Service appointment was being terminated effective February 28, 1985.

C. The Decisions Below

In February 1985, Krc filed a grievance with the FSGB protesting the termination of his Foreign Service appointment. A motion by USIA to dismiss the grievance on jurisdictional grounds was denied by the FSGB in a written opinion dated August 13, 1985. (App. 92a-100a.) Both Krc and the agency thereupon engaged in extensive pre-hearing discovery, during which USIA contended that Krc had violated the Yugoslavia fraternization policy and was guilty of other kinds of misconduct as well. Krc vehemently denied the misconduct allegations. In addition, Krc developed evidence that the security decision underlying his termination had been based on invidious discrimination against homosexuals. For example, Krc's discovery showed that USIA had never terminated a heterosexual FSO for even the clearest violation of a fraternization policy, and that USIA's security director openly disagreed with the agency's stated policy of not discriminating on the basis of sexual orientation.

On March 19, 1987, the FSGB exonerated Krc of any misconduct and ordered that Krc be reinstated to USIA's Foreign Service. (App. 101a-119a.) The FSGB arrived at its

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[5/]The complete text of the security director's January 11, 1985, memorandum is found at App. 26a.

decision after a two-day hearing at which Krc demonstrated (a) that the applicable Yugoslavia fraternization policy did not prohibit casual sexual relations with foreign nationals; (b) that homosexual conduct did not violate applicable Yugoslavia law, norms, or customs; and (c) that Krc had been extremely careful to tailor his conduct to all applicable laws and agency policies. The FSGB expressly credited Krc's testimony that, if homosexual conduct were prohibited or even socially inappropriate in any country of assignment, he would refrain from such conduct there. (App. 113a-114a.)

In June 1987, USIA sought judicial review of the FSGB's order. The district court, relying on *Department of Navy v. Egan*, 484 U.S. 518 (1988), held that the FSGB had no authority to review USIA's 'security clearance determinations' and set aside the FSGB's order on April 20, 1989. (App. 69a-85a.) On June 5, 1990, in *Krc I*, the court of appeals affirmed that decision, although on a different ground. (App. 35a-54a.) The court of appeals construed the Foreign Service Act to preclude Krc, as an untenured FSO, from appealing to the FSGB unless his termination was 'conduct-based.' (App. 41a, comparing 22 U.S.C. §§ 4010(a), 4011.) According to the court of appeals in *Krc I*, the FSGB lacked jurisdiction of Krc's grievance because Krc 'was not terminated for conduct-related reasons.' (App. 42a.) Instead, 'Krc was terminated from the Foreign Service because [USIA's security director] believed that his homosexuality made him 'an intolerable security risk.'' (App. 40a.)

The court of appeals in *Krc I* also affirmed the dismissal of Krc's statutory and due process counterclaims. Despite the broad language of the Foreign Service Act requiring that '[a]ll personnel actions' must accord with a lengthy list of 'merit principle' requirements, 22 U.S.C. § 3905(a), the court of appeals found 'no law to apply' and thus dismissed Krc's claims under the Foreign Service Act and the APA on the ground that USIA's action was committed to agency

discretion by law. (App. 45a, citing 5 U.S.C. § 701(a).) The dismissal of Krc's counterclaim that USIA had deprived him of liberty without due process of law was affirmed on the ground that Krc could show neither a cognizable alteration of status nor damage to reputation. (App. 47a-48a.) And Krc's counterclaim that USIA had deprived him of property without due process of law was dismissed on the ground that Krc's only property interest in his limited appointment was not to be discharged for 'misconduct' without an FSGB hearing.[6/]

At the same time, the court of appeals in *Krc I* remanded the case to the district court for further consideration of Krc's equal protection claim and Krc's claim that the agency had intentionally interfered with his prospective employment opportunities. (App. 51a-52a.) On August 15, 1991, the district court granted 'summary judgment' on those claims (App. 55a-68a), even though USIA had not sought summary judgment with respect to the interference with employment claim, and even though USIA had submitted no affidavits or other evidence concerning Krc's equal protection claim. Instead, the agency had simply moved to dismiss both claims on the ground of sovereign immunity. In the alternative, USIA had moved for summary judgment on Krc's equal protection claim, but solely on the ground that a statement in one of the district court's pre-remand opinions constituted a 'finding' that was somehow dispositive of that claim.[7/]

[6/]App. 49a-50a. Officer candidates such as Krc serve under "limited appointments" that may be terminated at any time, 22 U.S.C. § 4011, unless the separation "is to be by reason of misconduct," in which event the untenured FSO is entitled to have "a hearing before the Foreign Service Grievance Board and the cause for separation established at such hearing." *Id.* § 4010(a)(2).

[7/]The so-called "finding" was a sentence in the district court's April 20, 1989, opinion denying USIA's motion to dismiss Krc's liberty-interest claim on the ground that Krc had been stigmatized because he had been terminated based on his particular homosexual conduct rather than a policy

(continued...)

Because the district court agreed with USIA that Krc's equal protection claim was precluded by the earlier 'finding,' the district court did not consider any of the evidence that Krc submitted in opposition to USIA's motion to dismiss or, in the alternative, for summary judgment. Krc had proffered agency documents and sworn testimony showing among other things (a) that USIA's security director disagreed with the Foreign Service policy of nondiscrimination against homosexuals, and had told numerous people that homosexuality *per se* should be a disqualification for employment in the Foreign Service; (b) that another member of USIA's security office had said that Krc's 'problem' was not just his specific sexual conduct, but also his 'sexual preference,' a 'type of behavior' the Foreign Service does not 'condone'; (c) that USIA's security office investigated homosexual activity regardless of its legality, but never investigated heterosexual activity unless it was accompanied by charges of unlawful or improper conduct; and (d) that USIA's security office imposed disparate security restrictions based on sexual orientation, so that heterosexuals who did engage in sexual misconduct were denied security approval only for postings to 'criteria' (Communist) countries, whereas homosexuals (even if they did not engage in misconduct) were denied security approval for postings anywhere in the world.

On April 9, 1993, in *Krc II*, a divided panel of the court of appeals affirmed the award of summary judgment to USIA on Krc's equal protection and interference with prospective employment claims.[8/] The majority did not

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[7/](...continued)
against homosexuals in general. (App. 82a-83a.) Ironically, the district court had soon thereafter vacated this so-called "finding" in any event, by granting USIA's motion for reconsideration and dismissing Krc's liberty-interest claim on May 31, 1989. (App. 86a-90a.)

[8/]App. 5a-34a. The court also affirmed the dismissal of a third counterclaim, one that Krc no longer pursues.

adopt the district court's reasoning but instead derived its own theory to affirm the lower court's equal protection decision. According to the panel majority in *Krc II*, it was irrelevant whether Krc's sexual orientation played a part in USIA's termination decision, because USIA had other 'legitimate' reasons for terminating Krc's appointment and would have done so even if Krc had been heterosexual. *Krc II* therefore concluded that USIA was entitled to summary judgment under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that an employer escapes liability in a Title VII sex discrimination case if it can show as an affirmative defense that the adverse employment decision was motivated by legitimate as well as illegitimate considerations, and that the employer would have reached the same decision even in the absence of the illegitimate considerations.

According to the majority in *Krc II*, the critical conclusions — that USIA had 'legitimate' reasons for terminating Krc's appointment, and would have done so even if Krc had been heterosexual — followed inescapably from the nature of Krc's conduct in Yugoslavia. Specifically, the *Krc II* opinion asserted that Krc had shown 'appallingly poor judgment' by engaging in 'sexual escapades' with foreign nationals. (App. 9a.) Krc's 'sexual indiscretions' and '*liaisons dangereuses*' in Yugoslavia amounted to such 'ill-advised conduct' that '[i]t is beyond genuine dispute' that USIA would have terminated Krc's appointment regardless of his sexual orientation. (App. 9a-10a & n.*.) After making these *ad hominem* comments about Krc, the court of appeals upheld summary judgment for USIA on Krc's equal protection claim based upon an affirmative defense that USIA itself had never advanced.[2/]

[2/] *Krc II* similarly affirmed summary judgment on Krc's interference with employment claim, concluding that, in light of Krc's "poor judgment," USIA's security office was simply being accurate when it advised prospective employers that it had developed "adverse information" about Krc. (App. 13a-14a.)

REASONS FOR GRANTING THE WRIT

There are several important reasons why the decision below should be reviewed, if not summarily reversed.

First, there is a fundamental and irreconcilable conflict between the court of appeals' decisions in *Krc I* and *Krc II*. In *Krc I* the court deprived Mr. Krc of the relief he had been afforded by the Foreign Service Grievance Board, on the ground that the Board's jurisdiction was limited to cases involving termination for alleged misconduct and that the termination here did not arise from Krc's conduct. But in *Krc II*, in order to dismiss Krc's constitutional claims, a different panel of the same court ruled on summary judgment that Krc's termination was properly based on his "ill-advised conduct," thereby contradicting *Krc I* while substituting its own inexpert judgment for the contrary judgment of the expert agency created by statute to make such judgments.

Additionally, the decisions below conflict with this Court's precedents and with important legal principles in several ways. *First*, in casual disregard of basic procedural rules, the court of appeals granted summary judgment to USIA on an affirmative defense that had never even been raised. *Second*, the court's summary dismissal of Krc's due process claims, on the ground that he had no "right" to a security clearance, ignored the undisputed fact that Krc *never lost* his security clearance but was nonetheless blacklisted from foreign service and foreclosed from other employment opportunities because of USIA's groundless statements about him. *Third*, the dismissal of Krc's statutory claims on the ground that his termination was "committed to agency discretion by law" cannot be reconciled with the plain language of the Foreign Service Act, which requires all personnel actions to be based on merit principles, or with the teachings of this Court that APA review of agency action is appropriate in such cases. *Fourth*, the court of appeals erred in holding that the FSGB had no

jurisdiction to review Krc's dismissal. The Board had upheld its own jurisdiction, and the court of appeals was required by this Court's precedents to defer to the FSGB's reasonable interpretation of the statute.

Viewed as a whole, the decisions of the courts below evince the same kind of reflexive hostility toward *lawful* homosexual activity that formed the basis of USIA's actions against Krc. A writ of certiorari should issue because this case presents the nightmare of an innocent employee who has been discharged, has been denied an opportunity to clear his name of false misconduct charges that resulted in foreclosure of other employment opportunities, and has been denied any fact-finding hearing on the critical factual issue of whether he would have been treated the same way if he were heterosexual.

I. THE DECISIONS BELOW IN *KRC I* AND IN *KRC II* ARE SQUARELY IN CONFLICT, CALLING FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The decisions below in *Krc I* and *Krc II* are squarely in conflict. The interests of judicial consistency and basic fairness require that this case be remanded to the court of appeals with instructions that the conflict be resolved.

The conflict between *Krc I* and *Krc II* lies in the fact that those decisions cannot both be correct. *Krc II* holds that Krc lost his Foreign Service appointment as a result of USIA's view that he engaged in 'ill-advised conduct' in Yugoslavia. (App. 10a & n.*.) If that holding is correct, then *Krc I* was wrong to set aside the FSGB's 1987 decision on jurisdictional grounds. Section 610 of the Foreign Service Act gives untenured FSOs such as Krc the right to an FSGB hearing before they can be separated from the Foreign Service 'by reason of misconduct.' 22 U.S.C. § 4010(a)(2).

Moreover, Section 610 applies to any separation resulting from the employee's alleged misconduct, even if the separation decision purports to rest upon some other ground.[10/] Thus the holding in *Krc II* — that Krc lost his appointment as a result of USIA's view about his conduct in Yugoslavia — compels the conclusion that Mr. Krc was entitled to challenge the agency's erroneous impressions about his conduct at an FSGB hearing.

Similarly, if *Krc I* is correct in holding that the FSGB lacked jurisdiction over Krc's grievance because 'Krc's termination was not conduct-based' or 'conduct-related' (App. 41a-42a), then *Krc II* was wrong to find that USIA terminated Krc's appointment because of legitimate conduct-based reasons.[11/]

The majority opinion in *Krc II* brushed aside the conflict between its holding and the decision in *Krc I* on the semantic ground that Krc lost his appointment because of his 'conduct,' not his 'misconduct.' (App. 10a & n.*.) It said:

[10/]The phrase "by reason of" merely requires "a causal connection." *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984). It is synonymous with such phrases as "because of," "in consequence of," "resulting from," and "on account of." *See, e.g., City of Peoria v. Underwriters at Lloyd's, London*, 290 F. Supp. 890, 892 (D. Ill. 1968); *Waters v. National Life & Acc. Ins. Co.*, 61 F. Supp. 957, 959 (N.D. Okla. 1945). Thus, as the court of appeals noted in *Krc I*, Section 610 does not come into play only when expressly invoked, but applies to any termination that stems in fact from the FSO's alleged misconduct. *Krc I*, 905 F.2d at 394. *Accord, Miller v. Baker*, 969 F.2d 1098, 1101 (D.C. Cir. 1992); *cf. Mervin v. FTC*, 591 F.2d 821, 829 (D.C. Cir. 1978).

[11/]In finding that USIA had "legitimate" reasons for terminating Krc, the majority in *Krc II* was obviously swayed by the existence of the secret information relating to Krc. It is undisputed, however, that USIA would not have taken any action against Krc based on this information alone. Thus any assessment of the legitimacy of USIA's termination decision cannot stop with the secret information -- the agency itself admits that it based the termination decision on the secret information plus something else. Whether that additional factor was Krc's alleged misconduct or his sexual orientation is a critical factual issue still in dispute.

'Conduct that violates no canon may, as here, for example, reflect poor judgment.' *Id.* Whatever merits this thin distinction may have in other settings, however, it simply cannot apply to Foreign Service officers, whose canon of conduct requires the display of good judgment at all times. Thus 'poor judgment and lack of discretion' is expressly defined to constitute *misconduct* by USIA's own regulations. (App. 122a.)

Moreover, USIA's contentions during the FSGB proceeding make it impossible now to say that the agency was merely concerned about Krc's 'conduct' rather than his supposed 'misconduct.' The agency alleged during the FSGB proceeding that Krc had shown 'poor judgment and lack of discretion' in Yugoslavia — an allegation expressly rejected by the FSGB. (App. 112a.) Under the Foreign Service Act, it is for the FSGB, not the court of appeals, to say whether an FSO has displayed 'appallingly poor judgment' or engaged in 'ill-advised conduct.' Given the FSGB's finding that Krc went out of his way to ascertain and comply with foreign law and agency policy, the court of appeals' assertion that USIA was legitimately concerned about Krc's 'appallingly poor judgment' is grotesque.

In any event, *Krc I* and *Krc II* are fundamentally irreconcilable, and this Court should not permit such judicial inconsistency. If USIA did terminate Krc as a result of his 'conduct,' then Krc was entitled to defend that conduct at a hearing before the FSGB, and the FSGB's 1987 decision should not have been vacated for want of jurisdiction. On the other hand, if USIA did not terminate Krc because of his 'conduct,' then the rationale of *Krc II* for dismissing Krc's equal protection claim under *Price Waterhouse* cannot be allowed to stand.

II. THE DECISIONS BELOW ALSO CONFLICT WITH SEVERAL OF THIS COURT'S MOST BASIC PRECEDENTS.

In addition to their conflict with each other, the court of appeals' decisions in *Krc I* and *Krc II* also conflict in several important respects with the decisions of this Court. Each of these conflicts provides an independent reason why the decisions below should be reviewed, if not summarily reversed.

A. Summary Judgment Should Not Have Been Granted on Krc's Equal Protection Counterclaim.

The court of appeals in *Krc II* awarded USIA summary judgment on Krc's equal protection claim not only because it said Krc's conduct was 'appalling,' but also because it declared that USIA would have terminated Krc on the basis of that conduct even if Krc had been heterosexual. (App. 9a-10a & n.*, relying on *Price Waterhouse*, 490 U.S. at 244-45.) The court of appeals implicitly recognized that it was USIA's burden to prove the 'affirmative defense' that Krc would have been terminated regardless of his sexual orientation. (*Id.*) Nevertheless, it found that point to be 'beyond genuine dispute' even though USIA itself had never sought summary judgment under *Price Waterhouse* (or even cited that decision in its briefs), and even though USIA had never offered any affidavits or other evidence to support such an affirmative defense.[12/]

[12/]USIA sought summary judgment on Krc's equal protection claim solely on the basis of its circular theory that the disparate treatment was individualized. According to the agency, "Krc was denied approval for overseas assignments in the Foreign Service because his homosexuality presented a unique security risk not necessarily presented by all other homosexuals, and not because of his homosexuality in general." The agency at no time claimed that Krc would have been terminated even if he were heterosexual.

Even if the agency had offered such evidence, it still should not have been awarded summary judgment under *Price Waterhouse*. The question of whether an employer who has been motivated by both legitimate and illegitimate considerations would have reached the same result even in the absence of the illegitimate considerations is one on which summary judgment is almost never appropriate — because the very evidence offered by the employee to prove that the illegitimate factor played a substantial role in the challenged employment decision will almost always create a genuine factual dispute when the employer responds that it would have made the same decision anyway on other grounds. The weighing of the closely balanced evidence in such situations should occur, as it did in *Price Waterhouse*, only at trial.

In any event, *Krc II* surely erred in awarding USIA summary judgment based on an affirmative defense the agency had never articulated or offered evidence to support. The decisions of this Court emphasize that summary judgment is not appropriate when the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict on that issue for the nonmoving party.[13/] In this case, there are at least three such material facts in genuine dispute. The first is why Krc was the subject of adverse action by USIA's security office — an issue on which the court of appeals in *Krc I* and *Krc II* reached two entirely different conclusions. The second is whether Krc's conduct in Yugoslavia demonstrated 'poor judgment' — an issue on which the court of appeals in *Krc II* reached a conclusion contrary to the considered and unanimous judgment reached after a hearing on the merits by the FSGB. And the third is whether, regardless of the nature of Krc's conduct, USIA would have treated a heterosexual officer in Krc's position the same way it treated Krc. The existence of a genuine dispute on that third issue follows from the vast

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[13/] *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

amount of evidence proffered by Krc to show that his sexual orientation played a substantial role in the challenged employment decision in the first place.[14/]

The fact that *Krc II* awarded summary judgment under *Price Waterhouse* in a manner that disregards or conflicts with numerous decisions of this Court — including the decision in *Price Waterhouse* itself — provides an independent reason why the decision below should be reviewed, if not summarily reversed.

B. Krc's Due Process Counterclaims Should Not Have Been Dismissed.

The court of appeals in *Krc I* upheld the dismissal of Krc's counterclaims that, if the FSGB decision were nullified, USIA's termination decision deprived him of interests in liberty and property without due process of law. The dismissal of those claims was erroneous.

According to the opinion in *Krc I*, the dismissal of Krc's property-interest claim was required because he was not being terminated by reason of misconduct, but because USIA's security director considered Krc's homosexuality a basis for refusing to approve him for overseas postings. 'Unfortunately for Krc, since no independent property right attaches to the security clearance, the merits of USIA's withdrawal of a security clearance are beyond review.' (App. 50a, citing *Department of the Navy v. Egan*, 484 U.S. 518, 528-29 (1988).) That analysis is unacceptably simplistic.

[14/]Krc's proffer emphasized not only the agency's numerous statements about his sexual orientation, but also the fact that USIA almost never terminated the appointments of officers who had heterosexual affairs with foreign nationals even in blatant violation of agency fraternization policies. Although the opinion in *Krc II* quibbled with Krc's reading of the record (App. 11a), it acknowledged that "[t]he record does not contain an exact heterosexual analogue to Krc's case" (*id.*). Thus, in the end, *Krc II* retreated from the proposition that equality of treatment was "beyond genuine dispute," and simply asserted that the possibility of disparate treatment seemed "most unlikely." (App. 12a.)

Of course it is true, as *Egan* observed, that no one has a 'right' to a security clearance. The important principle remains, however, that the government cannot withdraw the privilege of holding a security clearance for reasons that are 'patently arbitrary or discriminatory.' *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 897-98 (1961); *Greene v. McElroy*, 360 U.S. 474, 496-508 (1959); *accord*, *Webster v. Doe*, 486 U.S. 592 (1988). As a result, *Krc I* erred in summarily dismissing Krc's claim that he had been deprived of his Foreign Service appointment without due process of law.[15/]

Krc I also erred in affirming the dismissal of Krc's liberty-interest claim on the theory that Krc could 'show' neither a cognizable change in status nor an accompanying injury to his reputation. (App. 47a-48a.) In the first place, what Krc could or could not 'show' was irrelevant in deciding USIA's motion to dismiss, because such a motion merely tests the legal sufficiency of the claimant's pleadings. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). More important, Krc's counterclaim fully met the requirement of pleading that this is 'a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity.' *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. at 898. Specifically, Krc alleged that he had lost his Foreign Service appointment as a result of being declared 'an intolerable security risk,' that USIA had foreclosed him from specific employment opportunities by telling third parties that the agency had learned 'adverse information' about him, that USIA's basis for defaming him (Krc's alleged misconduct in Yugoslavia) was untrue, and that Krc had been given no meaningful opportunity to rebut the agency's false charges. Because these allegations state a claim that Krc was deprived

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[15/]In particular, the court of appeals in *Krc I* simply ignored Krc's contention that the "withdrawal" of security "approval" for him to serve anywhere overseas was arbitrary and unfair because the security office lacked authority to deny such "approval" except for postings to so-called criteria (Communist) countries. As stated above, Krc retained his top-secret security clearance throughout the relevant period.

of liberty without due process of law, the contrary holding in *Krc I* should be reviewed if not summarily reversed.

C. Krc's Statutory Counterclaims Should Not Have Been Dismissed.

The court of appeals further erred in *Krc I* when it dismissed Krc's statutory counterclaims under the Foreign Service Act and the APA. Krc filed those claims on the theory that, even if his grievance did fall outside the jurisdiction of the FSGB, there was no reason why the same statutory claims that Krc had advanced to the FSGB could not be independently reviewed by the federal courts. The district court dismissed these claims without explanation — something the court of appeals agreed was 'puzzling.' (App. 46a.) Nevertheless, the court of appeals affirmed the dismissal on the ground that the agency's action was 'committed to agency discretion by law.' (App. 44a, citing 5 U.S.C. § 701(a)(2).)

The dismissal of Krc's statutory claims in *Krc I* was an unjustified departure from this Court's teaching that APA § 701(a)(2) applies only in those 'rare instances' where statutes are drawn in such broad terms that 'there is no law to apply.'[16/] This is not such a case. The Foreign Service Act requires '[a]ll personnel actions' to accord with 'merit principles,' 22 U.S.C. §§ 3901(a)(5), 3905(a)(1), and prohibits discrimination 'on the basis of conduct which does not adversely affect the performance of the employee,' *id.* § 3905(b)(4) (incorporating 5 U.S.C. § 2302(b)(10)). Moreover, the Act specifically bars the separation of any member (a term defined to include untenured officers such as Krc) when that is 'predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member.' *Id.* § 4131(a)(1)(A). The finding in *Krc I* of 'no law to apply' was egregiously wrong.

[16/] *See, e.g., Webster v. Doe*, 486 U.S. 592, 599 (1988); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

D. Krc's Counterclaim for Enforcement of the FSGB's Order Should Have Been Upheld.

Finally, *Krc I* erred in holding that the FSGB lacked jurisdiction of Krc's grievance in the first place. Even if Krc's termination had nothing to do with his alleged conduct/misconduct (as *Krc I* held), the fact remains that the FSGB still had jurisdiction to decide Krc's grievance. The holding in *Krc I* that the FSGB lacks jurisdiction to hear the grievance of an untenured FSO unless that FSO is nominally or actually being terminated for 'misconduct' (App. 40a-42a) erroneously disregards this Court's teaching that courts must respect the consistent construction by agencies of the statutes they administer.[17] The FSGB has consistently asserted jurisdiction to review the termination of a limited Foreign Service appointment whenever that action is said to violate any applicable statute or regulation. Because the FSGB's construction of its authority is not unreasonable, and mooted any need to decide whether Krc's separation arose by reason of 'misconduct,' *Krc I* erred in refusing to enforce the FSGB decision in this case.[18]

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[17] *See, e.g., Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

[18] The Foreign Service Act gives the FSGB jurisdiction over any "grievance" and defines that term in the broadest possible manner, as "any act, omission, or condition" which is unlawful "or which is otherwise a source of concern or dissatisfaction to the member." 22 U.S.C. § 4131(a)(1). To be sure, the Act excludes "the termination of a limited appointment" from the definition of a grievance, and provides that such appointments may be ended "at any time." *Id.* §§ 4011, 4131(b)(3). But the FSGB has observed that the phrase "at any time" does not mean "for any reason," and has repeatedly held that an officer candidate who is terminated for an unlawful reason may invoke the FSGB's jurisdiction to show that the *basis* for the separation was unlawful. USIA itself initially concurred in the FSGB's statutory construction in this case, and expressly agreed in a 1985 pleading that the FSGB had jurisdiction to review the termination of limited appointments "for misconduct [or] when the termination violates an applicable statute or regulation." Respondent's Reply to Grievant's Opposition to Respondent's Motion to Dismiss, May 9, 1985, at 1.

Indeed, the FSGB's broad construction of its authority to review the termination of limited Foreign Service appointments — even terminations not based on 'misconduct' — was recently endorsed by the United States Court of Appeals for the District of Columbia Circuit in a decision that is squarely inconsistent with the holding on that point in *Krc I*. *Miller v. Baker*, 969 F.2d 1098, 1011 (D.C. Cir. 1992). The court of appeals' *sub silentio* overruling of its own decision in *Krc I* provides further reason for issuing a writ of certiorari in this case or summarily reversing the denial of Krc's motion that the FSGB decision at issue be enforced.

The crabbed interpretation of the FSGB's jurisdiction in *Krc I* was obviously influenced by the court of appeals' doubt that the FSGB was qualified to review the merits of an agency's security clearance determinations. (App. 42a-43a, citing *Department of the Navy v. Egan*, 484 U.S. at 529.) But this Court's decision in *Egan* — which upheld the decision of the Merit Systems Protection Board ('MSPB') not to review the merits of an agency's refusal to grant a security clearance to one of its civil-service employees — does not even begin to control this case for at least three reasons. First, the statutes governing the MSPB and the FSGB are totally different in the scope of review they allow those boards to exercise.[19/] Second, unlike the MSPB described in *Egan*, the FSGB is not 'an outside nonexpert body.' To the contrary, the FSGB has special expertise in interpreting the rules and regulations (including security regulations) that apply to the Foreign Service community — and it was clearly

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[19/]The MSPB's jurisdiction is limited to the review of "adverse actions," a term of art that does not include the denial of a security clearance. *See Egan*, 484 U.S. at 530. In contrast, the FSGB's jurisdiction extends to every agency action that is not specifically excluded by statute, and the FSGB was created "to ensure the fullest measure of due process for the members of the Foreign Service." 22 U.S.C. § 3901(b)(4).

expected by Congress to decide grievances that would involve security issues.[20]

Finally, Krc's grievance did not involve making an 'affirmative prediction' about his ability to protect classified information — something which USIA itself stipulated when it allowed Krc to retain his security clearance. Instead, the main issues during Krc's grievance were whether he had engaged in misconduct during his tour in Yugoslavia, and whether the agency security officers who criticized Krc for allegedly violating foreign law and agency policy had also discriminated against Krc on the basis of his sexual orientation. At a minimum, the FSGB was surely authorized to clear Krc of the false misconduct charges and then remand his case for a fresh security determination on a clean record. The court of appeals' decision to the contrary in *Krc I* was erroneous.

* * *

The mistakes made by the court of appeals in this case are important because they seem to reflect the very discrimination against homosexuals of which Krc complains. Homosexuals are not all the same. In this case, an excellent Foreign Service officer candidate carefully tailored his conduct to comply with all applicable laws, norms, and agency regulations. Krc's integrity and reliability were never even challenged by USIA, as shown by the fact that the agency retained Krc in its employment and never moved to lift Krc's security clearance. The soundness of Krc's judgment and conduct were endorsed by the FSGB after it heard the testimony and weighed the demeanor of numerous witnesses, including both Krc and USIA's security director. For the court of appeals in *Krc II* to manufacture its own new theory to support summary judgment against Krc, and

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[20] *See, e.g.*, 22 U.S.C. § 4133(e) (providing for issuance of security clearances whenever necessary to assure the fair and prompt resolution of a grievance); *id.* §§ 4137(b) & (d) (allowing the agency to disregard FSGB "recommendations" -- but not "orders" -- upon a finding that implementation of the recommendation would adversely affect the national security).

denounce Krc for his 'ill-advised conduct' and 'appallingly bad judgment,' constitutes a disturbing and unjust distortion of the truth that should not be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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October 21, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5339 September Term, 1992

FILED JULY 23, 1993

United States Information Agency,

Appellee

v.

Jan Krc,

Appellant

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Wald dissenting from the denial of rehearing *en banc*, joined by Chief Judge Mikva, is attached.

Circuit Judge Ruth B. Ginsburg did not participate in this matter.

Separate Statement of Judge Wald

I dissent from the court's decision not to rehear this case *en banc*.

Although it is unusual (outside the military context) for a government agency to announce it has an exclusionary policy against homosexuals, this court is frequently called on to review cases in which more subtle and covert government discrimination against gays and lesbians is alleged. *See*, *e.g.*, *Doe v. Gates*, 981 F.2d 1316 (D.C. Cir. 1993). The panel's decision to uphold summary judgment for the government on this record signals that this court views such claims inhospitably; indeed, it is hard to see how a homosexual plaintiff will ever obtain a trial on the issue of whether he was fired or demoted because of sexual orientation if the mode of review applied here persists.

The panel affirms an award of *summary judgment* on an issue on which *the government bore the ultimate burden of proof--i.e.*, whether the USIA would have terminated Krc regardless of his sexual-orientation--despite the lack of any

contemporaneous USIA documents identifying Krc's "poor judgment" (the primary "neutral" consideration relied upon) as a sufficient cause for his termination, despite a key agency memorandum referring to several sexual orientation- specific factors to justify not letting Krc serve abroad; despite a witness' sworn statement that USIA security personnel told her that Krc's "problem" was not his conduct, but his sexual orientation; despite an acknowledgement by the key USIA decisionmaker that he considers homosexuality per se to have serious security consequences; and, finally, despite a prior panel decision in this very case clearly resting on the explicit ground that Krc's termination was status-, not conduct-, based. All of these factors compel the conclusion that there is a serious factual dispute here that deserves to be aired at trial and that makes summary judgment wholly inappropriate.

This case, I emphasize, is not a run-of-the-mill fact controversy of the type in which we routinely refuse *en banc* review. The affirmance of summary judgment in a case like this has wide implications for the way this court intends to deal with the recurring issue of alleged unconstitutional government discrimination against homosexuals--and for our ability to deal with similar mixed-motive Title VII cases. The decision raises serious questions as well about our summary judgment jurisprudence in cases where the movant bears the burden of proof on the dispositive issue.

For those reasons and because I believe a serious injustice has been done to Krc in denying him a trial on his claim of agency discrimination, I would grant the suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5339 September Term, 1992

FILED JULY 23, 1993

United States Information Agency,

Appellee

v.

Jan Krc,

Appellant

BEFORE: Wald, D. H. Ginsburg and Henderson, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, filed May 21, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 13, 1992 Decided April 9, 1993

No. 91-5339

UNITED STATES INFORMATION AGENCY

v.

JAN KRC, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-01740

D. H. Ginsburg, *Circuit Judge*: This appeal arises from a decision by the United States Information Agency to terminate the Foreign Service appointment of Jan Krc. The USIA Office of Security (USIA-OS or OS) determined that Krc posed a security risk because of certain homosexual relationships he had had during his assignment in Belgrade. Krc alleges that the USIA violated his right to equal protection, tortiously interfered with his prospective employment prospects, and interfered with his civil service career in violation of § 1103 of the Foreign Service Act, 22 U.S.C. § 4133(a). The district court granted summary judgment for the USIA on the equal protection claim, and as to the latter two claims, held that it lacked jurisdiction or, in the alternative, that the USIA was entitled to summary judgment. We affirm the district court's grant of summary

judgment on the equal protection and tort claims and its dismissal for lack of jurisdiction of the statutory claim.

I. BACKGROUND

Krc entered the Foreign Service with a limited appointment in 1982, and in 1983 was posted to Yugoslavia. While Krc was in Yugoslavia, the USIA Office of Security received certain information, classified "Secret," regarding him. (The Government has filed the Secret information with this court under seal.) When the USIA debriefed Krc at the end of his posting in 1984, it undertook to find an explanation for this Secret information. During this debriefing, Krc revealed that while in Yugoslavia, he had engaged in homosexual conduct with a number of partners, including not only other Foreign Service officers (FSOs) but also the assistant military attache of a non-NATO European country and two nationals of a Communist country.

In October 1984 after an investigation the USIA Personnel Director, Angie Garcia, informed Krc that she intended to terminate his Foreign Service appointment; his sexual relationships, she wrote, "demonstrated insubordination, irresponsibility, poor judgment and lack of discretion." In December 1984, however, upon hearing Krc's version of what he was told at a briefing about USIA's fraternization policy barring sexual relations with East Bloc nationals, Garcia decided to issue only an official letter of reprimand "based on the poor judgement [sic] and indiscretion demonstrated by [Krc's] actions." Shortly thereafter, the USIA Director of Security, Bernard Dowling, informed Garcia that he would "not approve any foreign service assignment of Mr. Krc because of the strong security risk involved." Dowling explained that Krc "not only showed poor judgment and lack of discretion" while in Yugoslavia but "also committed acts which we feel make him a security risk in any foreign service assignment," namely "engaging in homosexual relationships with eight different men, including two citizens of Yugoslavia."

Because Dowling refused to approve any future overseas assignments for Krc, Garcia informed him that she was terminating his Foreign Service appointment pursuant to § 611 of the Foreign Service Act. On March 2, 1985, the USIA officially terminated Krc's appointment to the Foreign Service and appointed him to a position in its domestic civil service (at a slightly higher annual salary). The USIA never revoked Krc's security clearance.

Krc filed a complaint with the Foreign Service Grievance Board challenging the termination of his Foreign Service appointment. In March 1987 the FSGB ordered Krc reinstated in the Foreign Service. The USIA sued in District Court to set aside the FSGB's order, and Krc counterclaimed, seeking enforcement of the FSGB's order and alleging that the USIA's failure to comply with the order violated the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, and the Due Process Clause of the Fifth Amendment.

Meanwhile, Krc began to pursue job opportunities elsewhere. In 1988 he tried to secure part-time work with a contractor working for the Defense Intelligence Agency. Krc could not be authorized for such work, however, until the Defense Industrial Security Clearance Office (DISCO) converted his security clearance into an industrial security clearance. In May 1988 DISCO submitted to the USIA-OS a form letter inquiring whether any "adverse information was developed subsequent to issuance" of Krc's security clearance. The OS answered in the affirmative, after which Krc was not hired for the job. As a result, Krc added a new counterclaim, alleging that by advising DISCO of "adverse information" about him, the USIA tortiously interfered with his prospective employment opportunities and business advantage.

The district court granted the USIA's motion to set aside the FSGB's order and dismissed the APA and due process counterclaims. The Court of Appeals affirmed, but remanded for the district court to consider Krc's equal protection and tortious interference claims. *United States Information Agency v. Krc*, 284 U.S. App. D.C. 284, 905 F.2d 389

(D.C. Cir. 1990). Meanwhile, in February 1990 Krc applied for an excursion tour to a United States consulate in Czechoslovakia, but the OS refused to clear him for that position. On remand, Krc added a third counterclaim, alleging that the USIA had refused to approve him for the excursion tour in retaliation for his earlier grievance and had therefore interfered with his civil service career in violation of § 1103 of the Foreign Service Act, 22 U.S.C. § 4133(a).

II. ANALYSIS

As indicated above, the district court denied Krc relief on all counts. We affirm that judgment for the reasons that follow.

A. *Equal Protection*

Krc alleges that his termination from the Foreign Service "deprived [him] of the equal protection of the law in violation of the Fifth Amendment." Specifically, Krc contends that the USIA discriminated against him on the basis of "his sexual orientation and conduct, factors that have no relationship to [his] ability to perform the duties of a Foreign Service officer or to his trustworthiness and loyalty to the United States." After reviewing the record and the Secret information submitted *in camera*, the district court found that the USIA had terminated Krc not on account of his sexual orientation but solely on account of his particular conduct and that the USIA had a rational basis for doing so. The district court therefore granted the USIA's motion for summary judgment on the equal protection claim.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), the Supreme Court outlined the showing that a plaintiff must make in order to prove intentional discrimination. Although *Price Waterhouse* itself was a Title VII sex discrimination suit, the way in which the Court allocated the burden of proof there applies equally to all claims of employment discrimination. *See, e.g., Pontarelli v. Stone*, 930 F.2d 104, 114 (1st Cir. 1991) (*Price Waterhouse* applies to § 1983 claim alleging employment

discrimination in violation of the equal protection clause of the Fourteenth Amendment). First, the plaintiff must prove that an illegitimate factor played a substantial role in the challenged employment decision. *See Price Waterhouse*, 490 U.S. at 258 (opinion of Brennan, J.); *id.* at 259 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring). If the employee makes that showing, then he or she will prevail unless the employer proves that it would have made the same decision even in the absence of the impermissible factor, an affirmative defense. *See id.* at 244-45 (opinion of Brennan, J.); *id.* at 259-60 (White, J., concurring) (quoting *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1987)); *Price Waterhouse*, 490 U.S. at 276-77 (O'Connor, J., concurring).

In this case, it is clear that the USIA would have terminated Krc from the Foreign Service on the basis of his conduct, *i.e.*, regardless of his sexual orientation. Therefore, we need not determine whether Krc's homosexuality in fact played a substantial role in the employment decision, nor whether it would have been rational for the USIA to have relied upon his homosexuality in terminating him from the Foreign Service (as opposed to restricting him to assignments in countries where homosexuality is not unlawful or perhaps even opprobrious, *cf. Padula v. Webster*, 261 U.S. App. D.C. 365, 822 F.2d 97, 104 (D.C. Cir. 1987)).

It is beyond genuine dispute that the USIA would have terminated the Foreign Service appointment of an officer who had heterosexual escapades with the military attache of a neutral country and with nationals of a Communist country. Such behavior reflects appallingly poor judgment and virtually invites an approach from a hostile intelligence service. Although Dowling testified that Krc's sexual activity probably gave rise to the Secret information, Krc alleges that the facts recounted in the Secret information actually arose prior to his sexual dalliances in Yugoslavia, and we assume, as we must, that the plaintiff's allegation is true. Even so, it is evident that these *liaisons dangereuses* at a minimum aggravated the security concerns raised by the Secret information.

Regardless of the order in which they arose, it was clearly the combination of Krc's conduct and the Secret information that prompted the OS to take the steps necessary to insulate him from an approach by a hostile intelligence agency in an uncontrollable foreign environment.*/

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*/Contrary to our dissenting colleague, see Dis. Op. at 1-3, 7-8, 14-16, 18, this understanding of the record in no way contradicts our earlier decision in this case. In United States Information Agency v. Krc, 284 U.S. App. D.C. 284, 905 F.2d 389 (D.C. Cir. 1990), we held that the FSGB had no authority to review Krc's termination because he "was not terminated for misconduct." Id. at 394. That is, Krc's conduct did not necessarily "violate a canon of conduct," id., such as the USIA's fraternization policy, and thus did not constitute "misconduct." But conduct that is not misconduct can have an adverse national security implication. See, e.g., 5 U.S.C. § 7311, Note, Executive Order 10450, at § 8(a)(1) (1988 ed.) (listing a broad array of circumstances relevant to a security determination, including evidence of unreliability, immoral behavior, illness, or "any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interest of the national security"). Conduct that violates no canon may, as here, for example, reflect poor judgment, and that is hardly irrelevant to the USIA's determination about an individual's fitness for Foreign Service duty overseas.

Moreover, when this case was first here, we never suggested that Krc's homosexuality was the sole reason for, or even "a necessary ingredient" in, (Dis. Op. at 15 n.13), his termination. Nor did we ever say--or even have occasion to say--that Krc's conduct was wholly irrelevant to the USIA's decision to terminate his Foreign Service appointment, as the dissent seems to suggest. Contra Dis. Op. at 1 ("we found as a matter of law that he was not dismissed because of any particular conduct"). Indeed the record makes clear that several factors, especially Krc's ill-advised conduct, contributed to the agency's decision to terminate Krc's Foreign Service appointment. Compare McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) (test for proving intentional discrimination where single reason motivates employment decision) with Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) (test for establishing discrimination in "mixed motive" case). Originally Garcia said she was terminating Krc's appointment because he had "demonstrated insubordination, irresponsibility, poor judgment and lack of discretion." In refusing to approve him for posting overseas, Dowling later cited Krc's "poor judgment and lack of discretion" (as evidenced by his conduct in Yugoslavia) as well as "his homosexuality." Accord Dis. Op. at 12 (referring to "Dowling's three-pronged explanation" for Krc's

(continued...)

Moreover, Krc can point to no pattern, or even instance, of USI disciplinary action to suggest that the agency discriminated against him in his security review on account of his homosexuality. Indeed, the evidence demonstrates that the USIA responds to sexual indiscretions--both homosexual and heterosexual--on a case-by-case basis, and evaluates the totality of the circumstances in deciding how to respond. Thus, in the four instances of record in which an FSO admitted to having engaged in homosexual conduct either with a non-Communist foreign national or with another FSO, the USIA imposed no sanction. The record does not contain an exact heterosexual analogue to Krc's case, *i.e.*, in which the agency had information about a heterosexual FSO similar to the Secret information about Krc and in which the heterosexual FSO had relations with persons who might well be used as informants or be vulnerable to blackmail, such as the Communist nationals and the neutral military attache with whom Krc was involved. In the closest cases of record, of which there are four, an FSO had had a heterosexual tryst with a foreign national in a hostile country. The USIA suspended the security clearances of all four FSOs and in one instance terminated the FSO's employment as well. In sum,

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[7](...continued)
termination).

Assuming arguendo that Krc's sexual orientation was one "significant" factor in the USIA's employment decision, as the dissent argues at length, see Dis. Op. at 3-4, 9, 10-14, 16-18, and that it was an illegitimate factor, the USIA would still prevail under Price Waterhouse if, as it claims, it would have terminated Krc's appointment based solely upon its other, unquestionably legitimate reasons for doing so. See Price Waterhouse, 490 U.S. at 244-45 (opinion of Brennan, J.); id. at 259-60 (White, J., concurring); id. at 276-77 (O'Connor, J., concurring). Therefore, contrary to the dissent, we are not "simply picking from the menu the most delectable item for [our] legal theory." Dis. Op. at 12. Rather, like the district court before us, see United States Information Agency v. Krc, No. 87-1740, at 4-5, 1991 U.S. Dist. LEXIS 11447 (D.D.C. Aug. 12, 1991) we think it perfectly clear that the USIA would have terminated Krc's Foreign Service appointment based solely upon the legitimate reasons it gave--i.e., Krc's sexual indiscretions in combination with the Secret information regarding him.

the uncontradicted evidence leads overwhelmingly to the conclusion that Krc's "termination resulted ... from the [USIA's] individualized determination that his own case represented a threat to ... national security." *See Doe v. Gates*, 981 F.2d 1316, 1324 (D.C.Cir.1993).

The simple fact is that Krc's conduct betrayed abysmal judgment and exacerbated the security concerns induced by the Secret information. Therefore, it is most unlikely that the USIA would have posted him abroad regardless of his sexual orientation. An FSO who cannot serve abroad is a contradiction in terms. Accordingly, Krc was not denied equal protection of the law.

B. *Interference with Prospective Employment Prospects*

Krc alleges that by advising the DISCO that it had developed "adverse information" about him, the USIA prevented him from pursuing another employment opportunity and intentionally interfered with his prospective employment opportunities and business advantage. In his complaint Krc requested both injunctive and monetary relief, but he subsequently withdrew all claims for monetary damages.

Although a claim for monetary damages would clearly be barred by sovereign immunity, *see* 28 U.S.C. § 2680(h) (Federal Tort Claims Act does not waive sovereign immunity for "claims arising out of ... interference with contract rights"); *Art Metal-U.S.A., Inc. v. United States*, 244 U.S. App. D.C. 1, 753 F.2d 1151, 1155 (D.C. Cir. 1985) ("claims for interference with prospective advantage are ... claims arising out of interference with contract rights"), whether sovereign immunity bars Krc's claim for injunctive relief is not quite so easily answered. We start with the Administrative Procedure Act, which provides: "Nothing herein ... confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Relying upon *Sharp v. Weinberger*, 255 U.S. App. D.C. 90, 798 F.2d 1521 (D.C. Cir. 1986), the USIA argues that the Federal Tort Claims Act impliedly forbids specific relief for tortious

interference with prospective employment opportunities. In *Sharp* we held that "the waiver of sovereign immunity in the [APA] does not run to actions seeking declaratory relief or specific performance in contract cases" because, by expressly providing for money damages as the "sole remedy" for contractual breach by the federal government, "the Tucker Act and the Little Tucker Act impliedly forbid [specific] relief." *Id.* at 1523. Here, in contrast, the FTCA specifically bars money damages as a remedy for Krc's claim, which by parity of reasoning implies that injunctive relief is available. Moreover, Krc does not seek specific performance of a contract, and the relief he does seek would impose a far lesser burden upon the Government than would an equitable action for breach of contract. Therefore, we conclude that the district court erred in finding that sovereign immunity bars Krc's request for specific relief.

The district court also held, in the alternative, that the USIA was entitled to summary judgment because its answer to the DISCO's inquiry regarding adverse information relevant to Krc's security clearance "was no more than an accurate response." We agree. "There is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third parties ... unless the interference is not improper under the circumstances." *Art Metal*, 753 F.2d at 1154-55 (quoting Restatement (Second) of Torts § 766 comment b (1979)). The USIA's action was clearly "not improper under the circumstances." The USIA is authorized to disclose "relevant data" to "duly authorized security agencies" regarding "significant security information in the file of a USIA employee." 55 Fed. Reg. 31963 (August 6, 1990).

Furthermore, "adverse information" clearly had come to light subsequent to issuance of Krc's security clearance: the USIA had learned that he had had sexual relations with the military attache of a neutral country and with two nationals of a Communist country during his stint in Belgrade. This information can only be characterized as "adverse" because it shows such poor judgment on the part of an FSO with

access to highly classified material that it caused the USIA to terminate his Foreign Service appointment. There is therefore no genuine issue of material fact relevant to Krc's claim of improper interference, and we affirm the district court's grant of summary judgment.

C. *Reprisal*

Krc claims that the USIA refused to approve him for an excursion tour in Czechoslovakia in retaliation for his grievance, and thereby restrained, harassed, or otherwise interfered with Krc and his career, in violation of 22 U.S.C. § 4133(a). The district court correctly held that it lacked jurisdiction over this claim.

The alleged reprisal occurred after Krc's Foreign Service appointment had been terminated. Although a current member of the Foreign Service may file a grievance for an "action alleged to be in the nature of reprisal," 22 U.S.C. § 4131(a)(1)(F), a former member such as Krc may file a grievance "only with respect to allegations described in section 4131(a)(1)(G)," 22 U.S.C. § 4132, to wit "denial of an allowance, premium pay, or other financial benefit." 22 U.S.C. § 4131(a)(1)(G). Krc is thus barred from seeking an administrative remedy for his reprisal claim.

In withholding an administrative remedy from a former FSO alleging reprisal, it appears that the Congress intended also to deny him a judicial remedy. The Supreme Court considered a similar situation in *United States v. Fausto*, 484 U.S. 439, 98 L. Ed. 2d 830, 108 S. Ct. 668 (1988). There the Court held that by precluding administrative review of dismissals of employees in the excepted service, the Civil Service Reform Act "displays a clear congressional intent to deny the excluded employees ... judicial review ... for personnel actions covered by" the CSRA. Id. at 447. *See also Block v. Community Nutrition Institute*, 467 U.S. 340, 347, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984) (holding that Agricultural Marketing Agreement Act, which provides for administrative review at the instance of milk handler affected by a milk marketing order but not at the instance of consumer

so affected, by implication precludes consumer from obtaining judicial review of order).

Like the CSRA, the Foreign Service Act provides "a comprehensive system for reviewing personnel actions taken against federal employees." *Fausto*, 484 U.S. at 455; *see* also Senate Report No. 96-913, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4419 ("Foreign Service Act is intended to be a companion measure" to the CSRA). Yet the Act clearly precludes an administrative grievance by a former FSO alleging reprisal. As in the CSRA, these factors "combine to establish a congressional judgment that [a former FSO] should not be able to demand judicial review" for a reprisal claim. *See id.* at 448.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is

Affirmed.

Wald, *Circuit Judge*, dissenting in part: When this case was before us earlier, we said quite specifically that the United States Information Agency's ("USIA") decision not to clear Jan Krc for foreign assignments--the critical determination that led directly to his discharge from the Foreign Service--stemmed from Krc's sexual orientation, not from any lack of judgment evinced by his sexual conduct: "*Although* Bernard Dowling, USIA's Director of Security, felt that Krc's 'conduct [in Yugoslavia] ... showed poor judgment and lack of discretion,' Dowling decided not to approve future overseas postings for Krc because of his belief that Krc's 'homosexuality would make him an extremely likely security target for hostile intelligence approaches.'" *United States Information Agency v. Krc*, 284 U.S. App. D.C. 284, 905 F.2d 389, 394 (D.C. Cir. 1990) (emphasis added; brackets and ellipsis in original) (quoting January 11, 1985 memorandum from Dowling to Angie Garcia, USIA Personnel Director). Indeed this finding was essential to the government's success in the earlier appeal because the

Foreign Service Grievance Board ("FSGB"), which had ordered Krc reinstated in the Foreign Service, only had authority to review Krc's dismissal if it was based on "misconduct." *See id.* Relying on Dowling's memorandum predicating security risk on the fact of Krc's homosexual status, we found as a matter of law that he was not dismissed because of any particular conduct, much less the type of "misconduct" necessary to invoke the FSGB's jurisdiction. *See id.* (noting that Krc was terminated because Dowling "believed that his homosexuality made him "an intolerable security risk,' not because Krc had violated a canon of conduct" (internal citation omitted) and concluding that, because the dismissal was based on Dowling's status-based concerns, "Krc's termination was not conduct-based"). We remanded to the district court, however, for consideration of several of Krc's remaining properly pleaded claims that the trial court had not previously addressed on the merits.

On this go-around, my colleagues, reviewing the decision of the district court on one of those claims, *i.e.*, that the USIA violated Krc's rights under the equal protection component of the Fifth Amendment by dismissing him because of his homosexuality, now inexplicably take an entirely different view of why he was discharged. On the basis of essentially the identical record before us the first time, *see* USIA Brief at 13 n.8 (acknowledging that USIA did not present district court with new material after remand), they find not only that Krc's homosexuality was not *the* reason for the USIA's negative security appraisal and eventual discharge of Krc, but also that it is "beyond genuine dispute," *see* Court Opinion ("Ct. Op.") at 6, that Krc's sexuality was not even a reason, *i.e.*, that his sexual orientation was entirely superfluous to the USIA's determination that he was a security risk. That is, even if the fact of Krc's homosexuality played some role in the USIA's decisionmaking, it did not *cause* Krc's discharge because, undisputedly, Krc's indiscreet sexual conduct combined with "undisclosed" secret information about him (information that USIA security personnel admit would not by itself justify the

action taken against Krc) would have compelled the USIA's Office of Security to reject him for all foreign assignments. *See id.* This startling re-reading of the record results in the defeat of any tenable equal protection claim by Krc because it denies him the benefit of a trial in which he might seek to prove that a substantial and necessary factor in his discharge was in fact his sexual orientation.[1/]

The majority's new causal conclusion flatly contradicts our earlier finding that Krc's discharge was not based on misconduct because it was based on his sexual orientation. I would have thought that finding came close to, if indeed it did not actually qualify as, the law of the case; certainly it should have been enough to preclude us from finding on the basis of essentially the same record the exact *opposite* as proven beyond any genuine factual dispute for purposes of summary judgment.[2/]

But even apart from its collision with our earlier interpretation of the events surrounding Krc's discharge, the

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[1/]Of course, under the current law of equal protection, even if a homosexual plaintiff can show that his sexual orientation caused a specific governmental decision, the government can escape liability if it can prove that its consideration of that factor was rational in the circumstances.

[2/]Even if, as my colleagues argue, a discharge based on "conduct"--as opposed to "misconduct"--also lies outside the FSGB's jurisdiction, see Ct. Op. at 6, n. *, that fact is not relevant here. While the conduct/misconduct distinction might also have led us to the conclusion that the FSGB had no authority to review a discharge, that was not the path we took when this case was last before us. As shown in the text, our previous holding that the USIA's action was not based on misconduct sprang directly from our conclusion that the discharge was status-based, not from any belief that the dismissal was based on "conduct" that fell short of "misconduct." See also 905 F.2d at 395 n.4 (contrasting Krc's case with a prior decision of this court in which a security clearance revocation was "explicitly conduct-based") (emphasis added). Thus, contrary to my colleagues' suggestion, see Ct. Op. at 6, n. *, a finding that Krc was fired because of his conduct does contradict our earlier decision. At any rate, the important point is not that our prior conclusion on the cause of Krc's discharge is determinative for all time, but, rather, that it renders inexplicable my colleagues' present conclusion that a directly contrary reading of the record is proved beyond any genuine dispute.

new explanation for his discharge flouts established principles governing the requirements for an award of summary judgment. To retain his right to a trial, Krc need only point to *some* minimal evidence that, viewed in the light most favorable to him, would permit a reasonable factfinder to conclude that the USIA's determination that he was a security risk was caused by the fact that Krc is an acknowledged homosexual. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *cf. Doe v. Cheney*, 280 U.S. App. D.C. 276, 885 F.2d 898, 910 n.10 (D.C. Cir. 1989) (upholding summary judgment on an equal protection claim where plaintiff brought forth *no* evidence disproving defendant's showing that it was the indiscriminate nature of sexual activity, not its homosexual nature, that led it to conclude that plaintiff was a security risk). Krc's evidence, moreover, must be reviewed in the context of a situation in which the USIA, not Krc, bears the burden of proving that its Office of Security would have done the same thing regardless of Krc's sexual orientation. *See* Ct. Op. at 5; *Anderson*, 477 U.S. at 254 ("In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."); *see also Kozup v. Georgetown University*, 271 U.S. App. D.C. 182, 851 F.2d 437, 439 (D.C. Cir. 1988) ("Where, as here, the plaintiff is under no heightened burden of proof ..., it takes but little evidence to create the necessary issue for trial.").

I find it difficult to comprehend how the record can be read to show other than that Krc has mustered more than sufficient evidence to clear the summary judgment threshold, *i.e.*, a showing that there are material facts in dispute. For now, I will highlight only a portion of the factual evidence in the record that must defeat the majority's finding of no genuine dispute about the nonhomosexuality related cause of Krc's discharge. Bernard Dowling, the USIA's Director of Security, explained his own decision not to approve Krc for postings abroad by alluding specifically to Krc's homosexuality--the fact that Krc had been "open" about his

sexual orientation to Yugoslavs as well as the fact that *homosexual* conduct was illegal in many countries. Neither fact, of course, is at all related to Krc's specific sexual *conduct* while in Yugoslavia. Additionally, Krc proffered sworn testimony that another member of the USIA's Security Office said that Krc's "problem" was not just his specific sexual conduct, but also his "sexual preference," a "type of behavior" the Foreign Service does not "condone." Finally, several other witnesses stated in depositions that, months after Krc's termination, Dowling, the sole decisionmaker in this case, suggested during an official training seminar that he considered homosexuality per se a disqualification for employment in the Foreign Service. This evidence and more, spelled out below, go far beyond the minimal showing of disputed fact necessary to make summary judgment on the causal issue of Krc's discharge totally unjustified.[3/]

I.

Jan Krc, a naturalized American born in (what was then) Czechoslovakia, received a limited appointment as an officer candidate in the Foreign Service in 1982. The official policy of the Foreign Service considers an applicant's sexual practices--heterosexual or homosexual--relevant only to the extent they reflect on the applicant's character or susceptibility to undue influence; thus, Krc was never asked about his sexual orientation during the application process and saw no need to volunteer that information. (In contrast, when applying to the CIA in 1981, Krc, voluntarily told an interviewer that he was gay because he believed that his sexual orientation was relevant to that agency's evaluation of his application.)

[3/]Although I agree that sovereign immunity is not a bar to Krc's interference with employment claim, see Ct. Op. at 9, my colleagues' conclusion that summary judgment is nevertheless appropriate on that question rests on the same inaccurate premise as their disposition of the equal protection claim: that there can be no genuine factual dispute as to the truth of the assertion that Krc's poor judgment caused the USIA to terminate him. See id. at 10. I concur on the reprisal claim.

In 1983, after completing basic training, Krc was assigned to work with the USIA in (again, what was then) Yugoslavia. Krc took leave in December of that year to visit relatives in Czechoslovakia and Hungary. Upon his return to Yugoslavia, "secret"[4] information concerning him came to the attention of the USIA's Security Office in Washington. Embassy officials in Yugoslavia discussed that information with Krc several times in early 1984. During those sessions, however, Krc was never questioned about his sexual conduct; in fact, Krc was told that the embassy was not concerned with "finding out whom [he] was sleeping with." Krc was also assured that the "secret" information did not reflect poorly on him, and he continued his normal routine of duties.

Krc's posting expired in the summer of 1984. On returning to Washington, he was "debriefed" by Robert Reinhold, a USIA security officer. During that session, Krc was queried for the first time by the USIA about his sexual orientation. When Krc forthrightly told Reinhold he was homosexual, that bare acknowledgement, in Reinhold's own words, constituted "testimony against interest." Reinhold then questioned Krc extensively about his homosexual conduct; Krc told him that he had engaged in brief sexual relationships with other Foreign Service officers, two Yugoslavs, and a Swedish foreign officer.[5]

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[4]This information has been submitted to the court under seal and cannot be discussed in this opinion. I emphasize, however, that Krc was told that the information by itself did not reflect adversely on him, and Dowling has stated that the USIA would have taken no action against Krc based on this information alone.

[5]Interestingly, it was Krc's encounters with other Foreign Service officers--and the other officers' identities--that peaked Reinhold's interest, not Krc's relationships with the Yugoslavs (the conduct which my colleagues now find reflects "appallingly poor judgment" and has such strong security implications, see Ct. Op. at 6). Reinhold spent over four hours questioning Krc about his relations with other Foreign Service officers; by contrast, only a few questions were directed to his relations with the Yugoslavs.

Krc's statements to Reinhold led directly to two separate attempts formally to separate him from the Foreign Service. First, the USIA's Office of Personnel sought to terminate Krc because of his "misconduct which demonstrates insubordination, irresponsibility, poor judgment, and lack of discretion." In an October 3, 1984 letter to Krc, Angie Garcia, the Director of USIA's Office of Personnel, announced that the reason for Krc's proposed discharge was that he had disobeyed a fraternization policy prohibiting sexual conduct with Communist country nationals, in this case, Yugoslavs. However, after Krc demonstrated to Garcia that the fraternization policy communicated to him in Yugoslavia proscribed only "deep emotional involvements"--not casual sexual relations of the sort Krc had engaged in--the USIA quickly backed off its proposal to terminate Krc's appointment. On December 11, 1984, Garcia wrote a letter to Krc stating that, as a result of her own research and Krc's presentation, she had decided that the evidence would not support his termination from the Foreign Service. In lieu of a discharge, Garcia gave Krc the proverbial slap on the wrist: for Krc's "poor judgment and indiscretion," he received a letter of reprimand that would be expunged from his file after, at most, two years.

Thinking the matter closed, Krc then bid on and was selected for a position in the Philippines. On January 11, 1985, however, before Krc could report to his new post, Dowling sent a memorandum to Garcia stating that Krc's "homosexuality" made him a likely target for hostile intelligence approaches and thus he would not be "approved" for any foreign assignments. To support that risk appraisal, Dowling's memorandum relied not only on Krc's sexual conduct, but also on the fact that he had been open about his sexuality and the fact that homosexual conduct was illegal in approximately 70 countries.[6/] Two weeks later, Garcia informed Krc that his Foreign Service appointment was

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[6/]The body of this document is reproduced infra at page 11.

terminated not because of "disciplinary or performance[ ]" problems, but because the Office of Security refused to approve any foreign postings.[7/] The very next day, Krc received a domestic civil service appointment within the USIA; he has remained in that position--with his Top Secret security clearance intact--ever since.

Soon after his separation from the Foreign Service, Krc filed a claim with the FSGB. After a full-scale hearing, that body found no nexus between the considerations highlighted by Dowling or the "secret" information and the interests of national security. Accordingly, it ordered Krc restored to his Foreign Service position. The USIA then sought review of the FSGB order in the district court; Krc counterclaimed for enforcement of the order. He also alleged that his dismissal was in violation of his due process and equal protection rights and that later actions by the USIA constituted interference with prospective employment. The district court, finding that the FSGB had no authority to review the USIA's security clearance determinations, set aside the FSGB's decision and denied all of Krc's counterclaims.

On appeal, we affirmed the district court in its vacation of the FSGB order because we found that Krc's termination was grounded in Dowling's security concerns, which, in turn, were based on Krc's homosexuality per *se, not on any lack of judgment shown by Krc's particular conduct*. *See* 905 F.2d at 394. Since, as noted, the FSGB had jurisdiction only over discharges based on allegations of "misconduct," we believed the USIA's decision, "even if ... unjustified," id., was not within the FSGB's purview.

At the same time, however, we remanded the case to the district court for further consideration of, among other things, Krc's claim that the USIA's reliance on his homosexuality in its security appraisal violated his equal protection rights. *See id.* at 399-400.

[7/]Garcia simultaneously vacated the letter of reprimand that she had issued a month earlier.

II.

The district court's decision granting summary judgment against Krc on the equal protection question is before us now.[8/] My colleagues conclude that, even assuming the USIA did consider Krc's homosexuality in its security appraisal, the "appalling" lack of judgment demonstrated by his sexual conduct abroad combined with the undisclosable "secret" material in the sealed record made Krc's discharge justifiable to the USIA. *See* Ct. Op. at 5-8. In other words, under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), Krc's homosexuality did not *cause* his dismissal because, given the significance of his sexual conduct and the "secret" material, there can be no dispute that the USIA would have terminated Krc regardless of his sexual orientation; any reliance the security officials might have placed on Krc's sexual orientation was, in the USIA's mind, clearly superfluous in light of these other overpowering concerns. *See id.* at 244-45 (opinion of Brennan, J.) (under Title VII, once a plaintiff shows that an impermissible criterion played a substantial role in an employment decision, employer bears burden of showing that factor did not cause the employment decision "by proving that [the employer] would have made the same decision even if it had not allowed [the impermissible factor] to play such a role"); *id.* at 276-77 (O'Connor, J., concurring in the judgment) (same). That conclusion is decisive because if Krc's sexual orientation played no determinative role in his discharge, he has no colorable equal protection claim.

But the majority simply cannot deliver in its attempt to wring its orientation-neutral causation finding out of this record. Krc has provided far more than the minimal amount of evidence necessary to put the real cause for his termination

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[8/]The district court, relying largely on a statement that was not a factual finding in a 1989 pre-remand opinion denying a motion to dismiss, granted the agency's summary judgment motion on the equal protection claim. The majority does not adopt the district court's reasoning but instead derives its own mixed-motive theory to affirm the lower court's decision.

in dispute. *See supra* pages 3-4 (discussing the relatively light burden a nonmoving party faces to prevent summary judgment on an issue on which the moving party bears the burden of proof). First, he has raised a significant question as to whether the USIA would ever have probed into his sexual conduct at all if he had not openly acknowledged his homosexuality. The timing of the USIA's actions against him lends support to his argument. It was Krc's disclosure of his sexual orientation to Reinhold--a disclosure that Reinhold himself termed "against interest"--that triggered the USIA's interest in the specifics of Krc's sexual conduct (and the homosexual conduct of other Foreign Service officers whom Krc could "finger," *see supra* note 5). Up to that point, even after the "secret" information came to the USIA's attention, security officials, still acting under the affirmative belief that Krc was heterosexual, indicated a notable disinterest in "whom [Krc] was sleeping with." Thus, the record certainly permits--and may indeed compel--the inference that, absent Krc's acknowledgement of his homosexuality, the USIA would have continued its lack of concern with Krc's private sex life. And, without the provocation of such an interest, Krc obviously would never have been fired because of any alleged lack of judgment with regard to those sexual activities.

In this respect, the case is similar to *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). There, the Navy obtained summary judgment from the Claims Court on an equal protection claim brought by a discharged gay ensign after showing that review of the ensign's performance record would have led to discharge regardless of his sexuality. *See id.* at 1071. But the Federal Circuit rejected this reasoning because, even if the Navy's assertions were uncontested, it was the plaintiff's acknowledgement of his homosexuality that spurred the

review that led to his discharge.[2/] *See id.* at 1073-74 ("The facts are clear that ensigns with low rankings were not referred to the reviewing office for reassignment or release. Only because of his homosexuality was Woodward referred for review and, it was, in part, the basis for his release from active duty."); *see also Buttino v. FBI*, 801 F. Supp. 298, 304 (N.D. Cal. 1992) (where investigation was undertaken after plaintiff acknowledged homosexual conduct, it was reasonable to conclude that "the very investigation resulting in plaintiff's termination would ... not have been undertaken if plaintiff were not gay"). The facts here require the same result: since there is real dispute as to whether the inquiry into Krc's sexual conduct would have occurred absent his acknowledgement of homosexuality, the record does not support the majority's finding that there is no question of fact that he would have been treated the same way if he were not gay, *i.e.*, if he were an active heterosexual who had engaged in several brief liaisons with fellow officers and Communist country nationals.

Moreover, even if Krc's sexual conduct might have come to light in any case, the record certainly does not support the inference--essential to the majority's conclusion--that the Office of Security would have found the "secret" information--which Dowling himself admits would not by itself warrant action against Krc--and the "poor" judgment shown by Krc's conduct by themselves to compel the drastic penalty of discharge. *See Price Waterhouse*, 490 U.S. at 252 (opinion of Brennan, J.) (to rebut showing that factor played a substantial role in decisionmaking, the employer must generally present objective evidence "that its legitimate reason, standing alone, would have induced it to make the same decision"); *see also id.* at 276-77 (O'Connor, J., concurring in the judgment). Here, the objective evidence

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[2/]The Federal Circuit analyzed this claim under the test of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). The Mt. Healthy standard is very similar to the Price Waterhouse test that the majority relies on.

suggests, rather, that Dowling, the sole arbiter of Krc's security qualifications, thought homosexuality per se was an important and necessary factor in security evaluations in general and in Krc's evaluation in particular. This attitude comes through most directly in Dowling's January 11 memorandum to Garcia announcing that Krc would not be approved for any overseas postings. Dowling wrote:

> I have again reviewed Mr. Krc's security file, particularly his actions at his last overseas post. As you know, he submitted a signed statement to the Office of Security on August 21, 1984 wherein he admitted engaging in homosexual relationships with eight different men, including two citizens of Yugoslavia while he was serving in Belgrade, Yugoslavia. By engaging in such conduct, he not only showed poor judgment and lack of discretion, he also committed acts which we feel make him a security risk in any foreign service assignment. Specifically, he admitted that he had been open about his homosexuality with a number of other Yugoslav nationals with whom he socialized, including those who would obviously be relied upon as informants by hostile intelligence services. Therefore, to allow Mr. Krc to serve in an overseas capacity would be an intolerable security risk since his homosexuality [sic] would make him an extremely likely target for hostile intelligence approaches. Also, in some seventy foreign countries homosexual acts are illegal and punishable by law. Therefore, by [sic] simply engaging in homosexual activity while overseas would place him in violation of the laws of most foreign countries thus further increasing his vulnerability to hostile approaches. Consequently, I will not approve any foreign service assignment of Mr. Krc because of the strong security risk involved.

My colleagues apparently think that Dowling's references to the problems caused by Krc's "openness" about his

homosexuality[10/] with Yugoslavs and the illegality of homosexuality abroad are gratuitous, and Dowling's "real" reason--the one sufficient in his mind to justify the discharge all by itself--is the one that he mentions first, the indiscretion shown by Krc's specific "homosexual relationships." *See* Ct. Op. at 6.

But, in granting or reversing a summary judgment, a court cannot simply pick from the menu the most delectable item for its legal theory. Here, the majority cannot select one strand of Dowling's three-pronged explanation and conclude that that arguably neutral factor--and I emphasize that it is not even clear that Dowling would have found heterosexual relationships akin to Krc's homosexual relationships to evince a similar lack of judgment--was alone or in combination with the "secret" material a sufficient reason to the USIA for Krc's discharge. Whether those reasons would have rationally supported Krc's discharge is not the issue here. The issue here is whether there is conflicting evidence in the record as to whether the judgment shown by Krc's sexual conduct together with the otherwise innocuous "secret" information were, in the USIA's view, adequate reasons for Krc's discharge or whether Krc's homosexuality played a necessary role in that decision. *See Price Waterhouse*, 490 U.S. at 252 (opinion of Brennan, J.) ("An employer may not ... prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."); *id.* at 261 (O'Connor, J., concurring in the judgment) (same).[11/] The Dowling memorandum

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[10/] Dowling has explained that Krc's openness consisted of simply being "candid" about his sexuality among the local embassy community. Since Dowling believes that hiding one's homosexuality invites blackmail and has other negative security consequences, the openness factor in reality applies to all persons of Krc's sexual orientation.

[11/] My colleagues' observation that Krc's "behavior reflects appallingly poor judgment and virtually invites an approach from a hostile intelligence service," Ct. Op. at 6, adds nothing to the record. The record shows that there is a genuine dispute as to whether the USIA itself

(continued...)

certainly raises a serious question whether Dowling was relying solely on orientation-neutral factors. When such a crucial document from the "horse's mouth" refers prominently to three factors as leading to a decision, minimally there has to be a genuine question of fact as to whether all of them were essential to that decision. *Cf. Hopkins v. Price Waterhouse*, 287 U.S. App. D.C. 173, 920 F.2d 967, 972-73 (D.C. Cir. 1990) (employer is liable under Title VII when court cannot distinguish evaluations "tainted" by sexism from those that reflected legitimate concerns).

Thus, in deciding that it is "perfectly clear that the USIA would have terminated Krc's Foreign Service appointment based solely upon the legitimate reasons it gave," Ct. Op. at 8, n. *, the majority, despite protestations to the contrary, necessarily pulls out the one arguably legitimate strand from the USIA's multifactored explanation and decides that that factor was, beyond dispute, enough in the USIA's view to discharge Krc. Moreover, my colleagues' conclusion that this point is "perfectly clear" is not based on a cache of overwhelming contemporaneous record evidence showing that the USIA thought Krc's conduct alone sufficiently egregious to warrant discharge--indeed, their conclusion is not bolstered by any contemporaneous record evidence on that point. Rather, my colleagues have simply made their own post hoc surmise as to what must have motivated the USIA years ago, corroborated by at best a few pieces of equivocal evidence about the USIA's decisions in other cases allegedly involving sexual conduct. *See* Ct. Op. at 5-8; *see also infra* pages 16-18 (discussing those other cases).

But even if Dowling's express reliance on Krc's homosexuality, by itself, were not enough to create a genuine question of fact about causation, there is additional direct and

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[11]/(...continued)
thought that Krc's behavior was sufficiently egregious to justify termination from the Foreign Service. Again, the relevant inquiry is not what might reasonably justify an employment decision, but what did motivate the employer at the time of the decision.

circumstantial evidence about the agency's reasons for terminating him and, more generally, about its attitude toward homosexuality. One witness swore that a member of the USIA's Security Office told her that Krc's "problem" was not just his behavior, but also his "sexual preference." *See also Doe v. Gates*, 981 F.2d 1316, 1323 (D.C. Cir. 1993) (opinion of Sentelle, J.) ("To cast more than metaphysical doubt [and thus survive summary judgment on the defendant's denial of the existence of a policy to discriminate against homosexuals, the plaintiff] should at least have provided some direct evidence of someone having knowledge of that policy asserting it to exist...."). Three other witnesses attested to statements by Dowling made at an official training session held months after Krc's termination suggesting he believed that no homosexuals should be sent abroad by the USIA. One of these witnesses testified that Dowling said that all USIA officers found to be gay are "sent back to America." Another recalled: "[Dowling] said there were three kinds of people or three types--I don't remember the exact words--... whether he said acceptable or they did not want ... in the foreign service: Drug addicts, alcoholics, and homosexuals."[12/] And Dowling himself said on the record that all USIA Foreign Service applicants should be asked whether they have ever engaged in homosexual acts because, in his words, that question "has serious security connotations."

As aforementioned, our own prior reading of the record is in accord with a view of the evidence that Krc's homosexuality was a vital component in the Office of Security's determination that he was not qualified for foreign assignments. I would have thought we could not have been clearer on this point. To repeat, we said, in a subsection

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[12/] Several witnesses also remembered that Dowling created, in their words, a "catch-22." As one put it: "It was ... anyone who is in the closet is [a] blackmail risk and anyone who is in the closet, the implication at least, if he didn't say it, I guess was, should come out with the understanding then that you come out and lose your job."

entitled "Reasons for Krc's Termination": "*Although* Bernard Dowling, USIA's Director of Security, felt that Krc's "conduct [in Yugoslavia] ... showed poor judgment and lack of discretion,' Dowling decided not to approve future overseas postings for Krc because of his belief that Krc's "homosexuality would make him an extremely likely security target for hostile intelligence approaches.'" 905 F.2d at 394 (emphasis added; brackets and ellipsis in original); *id.* ("Krc was terminated from the Foreign Service because Dowling believed that his homosexuality made him "an intolerable security risk' ...."); *see also id.* at 395 n.4 (contrasting Krc's case with a prior decision of this court in which a security clearance revocation was "explicitly conduct-based"); *id.* at 397 (rejecting Krc's Administrative Procedure Act claim in part because the statutory guidelines arguably applicable to his discharge did not "afford protection from discrimination on the basis of sexual orientation"). The previous opinion of this court says outright that Dowling's decision, unlike Garcia's earlier aborted attempt to terminate Krc, was not based on Krc's behavior, but on his sexual orientation. *See id.* at 394.[13/]

That resolution should presumably be the law of the case, binding us in later phases of the litigation absent the possibility of a " "grave injustice'." *See, e.g., Lever Brothers Co. v. United States*, 981 F.2d 1330, 1332 (D.C. Cir. 1993) (quoting *Laffey v. Northwest Airlines, Inc.*, 206 U.S. App. D.C. 173, 642 F.2d 578, 585 (D.C. Cir. 1980)). For, in deciding whether or not Krc's termination was based on "misconduct," and thus whether the FSGB had jurisdiction over Krc's case, we necessarily concluded as a matter of law

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[13/] My colleagues argue that our previous opinion "never suggested that Krc's homosexuality was the sole reason for or even "a necessary ingredient' in his termination." Ct. Op. at 7, n. * (citation omitted). But I find it impossible to read the opinion as standing for other than that Krc's sexual orientation was at the very least a necessary ingredient in the USIA's decisionmaking, not, as they would now have it, a factor so marginal that the USIA would have reached the same conclusion in its absence.

that the record would reasonably support no conclusion other than that Krc's homosexuality was the cause of his discharge. *See* 905 F.2d at 394 (stating that "the record presents little reason to question" Garcia's statement that Krc's termination was "not a disciplinary or performance-based action"); *see also supra* note 2 (noting that even if discharges based on "conduct" that is not "misconduct" are also outside FSGB jurisdiction, that distinction is not relevant because our prior decision found that the USIA's decision was based on Krc's sexual orientation).[14/]

But even if our earlier finding on this issue would not preclude a later factfinder from reaching a different conclusion after a trial in which witnesses' credibility could be evaluated and conflicting evidence weighed, at the very least it evidences that the record is open to a plausible reading of the USIA's motivation for discharging Krc other than the one my colleagues now find to be so obvious as to merit summary judgment. *Cf. Doe*, 981 F.2d at 1325 (Randolph, J., concurring in part and concurring in the judgment) (where Supreme Court had read the record in a specific way, even if the Court's "opinion in this regard is not the law of the case, it is something sufficiently similar to warrant our respect").

The only conceivable support in the record for my colleagues' new reading is the supposedly even-handed treatment given to homosexual and heterosexual officers in other cases investigated by the USIA's Office of Security. *See* Ct. Op. at 6-8. Even taking my colleagues' characterization of these cases at face value, they do not fatally undermine Krc's claim. His claim is that he was dismissed because *he* was gay; not that the USIA dismisses or discriminates against all gay officers. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, n. 14, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("[A] consistent pattern of official racial

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[14/] If we thought that there was any possible factual dispute on this question, we would have sent the case back for a trial on the issue, rather than affirming the district court's judgment in favor of the USIA.

discrimination is [not] a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act ... would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions."); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986) ("An equal protection plaintiff ... need not prove a discriminatory policy against an entire class; discrimination against the plaintiff because of her membership in the class is by itself enough."). While evidence of adverse treatment of other members of an allegedly discriminated against group is always helpful, *see id.*, the absence of such evidence is not dispositive especially when, as here, the plaintiff has provided direct and circumstantial evidence that *he* was discriminated against because of membership in a group. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714, 75 L. Ed. 2d 403, 103 S. Ct. 1478 n.3 (1983) (discrimination plaintiff can prove case by direct or circumstantial evidence).

In any case, the cases of discharged officers cited by my colleagues hardly provide the kind of slam-dunk proof that merits summary judgment. The four instances they refer to involving heterosexuals who had security clearances lifted involved sexual conduct that was of a different order and nature from Krc's behavior. In one case, a married officer fathered his secretary's child and had sexual relations with a prostitute from an East Bloc country. In two other cases, officers (one married) violated explicit fraternization policies by having affairs with Communist nationals.[15/] And, in the fourth case, a married domestic employee had sex with prominent nationals of foreign countries.

And contrary to my colleagues' assertion, *see* Ct. Op. at 6-7, there is also evidence from other security determinations

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[15/] Recall that Krc was initially charged with violating such a policy, but, after he demonstrated that his conduct was in line with the policy communicated to him in Yugoslavia, that allegation was not pursued.

that supports Krc's claim that homosexuality per se played a role in this case. After expressing his opinion that the risk of sending an acknowledged homosexual overseas was "unacceptable," Dowling ultimately denied a security clearance to one gay applicant who was never alleged to have engaged in any indiscreet sexual behavior in part because, in Dowling's words, his "admitted homosexual conduct, ... in an uncontrolled overseas environment may reasonably be expected to subject him to scrutiny and/or entrapment by hostile intelligence services."[16/] *See also* Letter of September 1987 from Bernard C. Dowling to Unidentified Applicant (explaining to same denied applicant that the delay in reaching a decision in his case "centered around your admitted homosexuality and your consequent vulnerability, from the standpoint of security, in an uncontrolled overseas environment where hostile intelligence services operate"). Thus, it is clearly a matter of dispute whether other employment decisions at the USIA have been affected by the perceived security effects of homosexuality per se.

CONCLUSION

Three years ago we returned this case to the district court with an admonition to listen to Krc's equal protection claim with an attentive ear: "[These types of] constitutional claims may well be the *only* check on agency actions that determine a person's career fortunes. Courts have an obligation to listen to those claims clearly and to consider them carefully. We urge the district court to consider our remand in this light." 905 F.2d at 400 (emphasis in original; internal citation omitted). On remand, no new evidence was considered; no new witnesses listened to; summary judgment was awarded on a factual basis rejected by this court in the prior appeal. Now, my colleagues, on a new theory of the case based on

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[16/] Although Dowling offered to allow this individual to serve subject to case-by-case approval of assignments by the USIA's Security Office, that offer came only after the FSGB's decision that Krc's termination was irrational.

an old record, seemingly close their eyes to significant direct evidence that might contradict a conclusion that nothing untoward happened here, might necessitate a trial on the troubling issue of whether Krc would have been treated the same way if he were heterosexual, and might even require us squarely to decide the rationality of this type of discrimination against homosexuals. I fear that under the relaxed standard for summary judgment used in this case and other recent gay rights decisions, *see Doe v. Gates*, 981 F.2d 1316 (D.C. Cir. 1993), it will be rare for any equal protection claim to survive the government's assertion that individualized conduct-based considerations unrelated to the plaintiff's sexual orientation led to the adverse personnel action. Our changing social and political climate may at last be consigning overt, obvious discrimination against gays and lesbians to the historical dust bin of Jim Crow laws. But, if history is a reliable guide, we can expect to encounter covert, subtle bias of an equally invidious and irrational nature. If we too complacently accept all conduct-related explanations for adverse actions against homosexuals without scrutinizing their validity and relevance by the time-honored test of trial, we will effectively read the Equal Protection Clause out of the Constitution for gay and lesbian Americans.

On that basis, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 4, 1990 Decided June 5, 1990

No. 89-5220

UNITED STATES INFORMATION AGENCY

v.

JAN KRC, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-01740)

Wald, *Chief Judge*: In early 1985, the United States Information Agency ("USIA" or "the agency") terminated appellant Jan Krc's employment in the Foreign Service.[1/] After the Foreign Service Grievance Board ("FSGB" or "the Board") ordered Krc's reinstatement without prejudice, USIA appealed to the United States District Court for the District of Columbia, which refused to enforce the Board's decision. The district court also dismissed Krc's claims that his termination violated his constitutionally protected liberty and property interests, as well as his statutory rights under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* (1988). We remand for the district court to consider

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[1/] USIA is authorized to employ members of the Foreign Service. 22 U.S.C. § 3922(a)(1) (1988).

Krc's assertion of a violation of his right to equal protection, but otherwise affirm the trial judge's conclusions.

I. BACKGROUND

A. *Statutory*

The 1980 Foreign Service Act ("the Act") created the FSGB to resolve certain types of "grievances" brought by members of the Foreign Service. *See generally* 22 U.S.C. §§ 4131 et seq. (1988). The Board is composed of

> no fewer than 5 members who shall be independent, distinguished citizens of the United States, well known for their integrity, who are not employees of the Department [of State] or members of the [Foreign] Service.

Id. § 4135(a). In general, a "grievance" is

> any act, omission, or condition subject to the control of the Secretary [of State] which is alleged to deprive a member of the Service who is a citizen of the United States of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member. ...

Id. § 4131(a)(1). The Act lists several examples of grievances, including "separation of the member allegedly contrary to laws or regulations." *Id.* § 4131(a)(1)(A). Expressly excluded from the grievances under the FSGB's jurisdiction, however, is "the termination of a limited appointment under [section 611 of the Act]. ..." *Id.* § 4131(b)(3). Section 611 provides that the Secretary of State "may terminate at any time" the appointment of most members of the Service serving under a limited appointment, *id.* § 4011, *unless* "separation is to be by reason of misconduct," *id.* § 4010(a)(2)(B). If a limited appointment member is separated for misconduct -- a separation pursuant to § 610 of the Act, id. § 4010(a)(2)(B) -- the member is entitled to a "hearing before the Foreign Service Grievance Board and the cause for separation established at such hearing. ..." Id.

Upon finding a grievance properly within its jurisdiction to be meritorious, the Board is authorized to direct the State Department to correct the grievant's official personnel record; to reverse a decision denying the grievant compensation or any other perquisite of employment; to reinstate the grievant; and to take other appropriate remedial action. *Id.* § 4137(b). Furthermore, if the FSGB finds that a grievance merits remedial action "that relates directly to promotion, tenure, or assignment of the grievant," the FSGB "shall make an appropriate recommendation" to the Secretary of State. The Secretary shall implement that recommendation unless, within a thirty-day period, the Secretary rejects the Board's recommendation on the grounds that implementation "would be contrary to law or would adversely affect the foreign policy or national security of the United States." Id. § 4137(d). "[Aggrieved]" parties may obtain review by a United States district court of final actions taken by the Secretary of State or the Board with regard to "any grievance," according to the standards set by the APA. Id. § 4140.

B. *Procedural*

Jan Krc, born in Czechoslovakia in 1956 and naturalized in 1973, entered the Foreign Service under a "limited" appointment as an "officer candidate" in 1982, and was first posted abroad, to Yugoslavia, in 1983. Before and during his Yugoslav posting, Krc attended Foreign Service security briefings informing him that the fraternization policy for Foreign Service members posted in Yugoslavia was more liberal than the policy with regard to other East Bloc countries, and that casual sex was permissible. Krc claims that he also determined that local norms and laws did not impede casual relationships, homosexual or heterosexual. During his posting, he had homosexual relationships with two other Foreign Service officers, two individuals who may have been Yugoslav citizens, and a third country national. The information Krc received during the briefings, however, did not comport with the fraternization policy of USIA's home

office, which prohibited all sexual contact with Yugoslav citizens.

During his debriefing at the end of his posting in 1984, Krc told a USIA security officer that he had engaged in homosexual conduct while in Yugoslavia. On the basis of that debriefing, USIA cancelled Krc's pending posting to South Africa to investigate his admissions. On October 3, 1984, Krc was notified by USIA's Office of Personnel that he was being terminated for insubordination and misconduct pursuant to §§ 610 and 611 of the Act. After Krc provided documentation that he had never been informed of USIA's strict fraternization policy, Angie Garcia, USIA's Personnel Director, issued a letter of reprimand in lieu of termination. A month later, on January 11, 1985, Bernard Dowling, USIA's Director of Security, informed Garcia that he would "not approve any foreign service assignment of Mr. Krc because of the strong security risk involved." Joint Appendix ("J.A.") 106. Dowling explained that Krc's homosexuality would make him extremely vulnerable to hostile intelligence approaches. Garcia informed Krc two weeks later that in light of Dowling's promise not to approve future overseas assignments, she was terminating his Foreign Service appointment effective February 28, 1985, pursuant to § 611 of the Act.

On March 2, 1985, USIA officially terminated Krc's Foreign Service appointment. The next day, however, USIA appointed him to a position in its domestic civil service, at an annual salary $ 333 higher than his Foreign Service salary. USIA never revoked Krc's security clearance, which he continues to use for his domestic work.

Krc filed a complaint with the FSGB protesting the termination of his Foreign Service appointment. The FSGB initially decided in August 1985 that Krc's complaint constituted a grievance within its jurisdiction; in March 1987, the FSGB ordered Krc reinstated to the Foreign Service on the grounds that his termination was "arbitrary and capricious and contrary to agency regulations." J.A. 58. The Board found no nexus between "the interests of national security"

and the factors on which USIA had relied in denying Krc's clearance for overseas duty, J.A. 62, and therefore ordered USIA to remove the restriction barring Krc from overseas assignments and to reinstate Krc, without prejudice, to a new five-year term as a Foreign Service career candidate.

In June 1987, USIA sued in United States District Court for the District of Columbia to set aside the FSGB's action. Krc counterclaimed, seeking enforcement of the Board's order and alleging that USIA's failure to obey the order violated both his statutory rights under the APA as well as his constitutional due process rights. *See* J.A. 232-37. In its first opinion, on April 20, 1989, the district court granted USIA's motion to set aside the Board's order on the ground that the FSGB "did not have the authority to review USIA's revocation of [Krc's] security approval for overseas service and to order his reinstatement as a limited appointee. ..." *United States v. Krc*, No. 87-1740, slip op. at 13 (D.D.C. Apr. 20, 1989).[2/] This holding was based largely on *Department of the Navy v. Egan*, 484 U.S. 518, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988), which had been handed down after the FSGB's determination. The district judge also dismissed Krc's claim to a violation of his property interest without due process. In a second opinion, filed May 31, 1989, the judge dismissed Krc's claims that USIA violated his liberty interest; without any discussion, he also rejected Krc's contention that USIA violated his statutory rights under the APA, and dismissed the case from the court's docket. *United States Information Agency v. Krc*, No. 87-1740, slip op. at 5 (D.D.C. May 31, 1989) (order) [hereinafter cited as May 31 Order]. As Part II-C, *infra*, discusses further, the judge apparently ignored Krc's May 1 amended counterclaim, *see* J.A. 238-49, which detailed his equal protection claims. On July 21, the judge dismissed for lack of jurisdiction Krc's June 2 motion to file a second amended counterclaim further

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[2/]The case should have been styled United States Information Agency v. Krc, since the trial judge had long since granted Krc's motion to strike the United States as a named party. See J.A. 5 (Docket Item 25).

delineating his constitutional claims. *United States Information Agency v. Krc*, No. 87-1740 (D.D.C. July 21, 1989) (order dismissing motion to amend counterclaim for lack of jurisdiction).

II. ANALYSIS

We now consider the district court's refusal to enforce the Board's decision and the court's dismissal of Krc's statutory and constitutional claims.

A. *Enforcement of the Board's Order*

The enforceability of the Board's decision depends on the Board's jurisdiction to review USIA's termination of Krc from the Foreign Service. The Board's jurisdiction, in turn, depends on the alleged reasons for Krc's termination under the Foreign Service Act.

1. *Reasons for Krc's Termination*

In her January 1985 letter, USIA's Director of Personnel informed Krc that the agency was terminating him "by authority of Section 611," which authorizes the Secretary of State to terminate the appointment of a limited Foreign Service appointee "at any time"; the termination, she explained, was "not a disciplinary or performance-based action." J.A. 107. The record presents little reason to question this assertion. Although Bernard Dowling, USIA's Director of Security, felt that Krc's "conduct [in Yugoslavia] ... showed poor judgment and lack of discretion," Dowling decided not to approve future overseas postings for Krc because of his belief that Krc's "homosexuality would make him an extremely likely security target for hostile intelligence approaches." J.A. 106. Dowling subsequently explained that he did "not want to be responsible as the director of security for placing [Krc] in an environment where he could be subjected to a hostile intelligence approach." J.A. 524.

Krc was terminated from the Foreign Service because Dowling believed that his homosexuality made him "an intolerable security risk," J.A. 106, not because Krc had

violated a canon of conduct governing Foreign Service officers. Indeed, Garcia had withdrawn her initial October 1984 termination decision after Krc provided evidence that he had never been informed of USIA's "stricter" fraternization policy and had made substantial efforts to comply with the policy communicated to him. The FSGB viewed Krc's termination similarly, concluding that USIA's decision to dismiss "was based solely on the determination of the Office of Security not to clear Krc for an overseas assignment." J.A. 57. Thus, even if Dowling's security concerns were unjustified, Krc's termination was not conduct-based and was legitimately classified under § 611.[3/]

2. *Section 611 Procedures*

A Foreign Service member terminated pursuant to § 611 has few avenues of appeal. The Act expressly states that "the termination of a limited appointment under [§ 611]" is not grievable before the FSGB. 22 U.S.C. § 4131(b)(3). On the other hand, "any act, omission, or condition subject to the control of the Secretary" that is a "source of concern or dissatisfaction to the member," including "separation of the member allegedly contrary to laws or regulations," is grievable. *Id.* § 4131(a)(1). In juxtaposition, these two provisions permit a Foreign Service member to grieve the question of whether USIA's *classification* was legitimate, as USIA would act "contrary to law[ ]" if it professed to terminate a limited appointee under § 611 when the termination was actually due to the appointee's misconduct. We need not define today the precise parameters of the hearing due an employee who the Board finds was actually terminated for misconduct. But the statute makes clear that a limited appointee who the Board finds was not terminated for misconduct -- whose termination was properly classified under § 611 -- has no further remedy with the FSGB; such a

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[3/]Section 611 clearly applied to Krc, who was "assigned to a salary class in the Foreign Service schedule." 22 U.S.C. § 4011; cf. Part I-A, supra, at 3.

termination is statutorily excluded from the "grievances" within the Board's jurisdiction.

The record here demonstrates clearly that Krc was not terminated for misconduct. The Board agreed with USIA's explicit explanation that Krc was not terminated for conduct-related reasons. The Foreign Service Act, therefore, excludes the agency's determination from the Board's purview. In Parts II-B and II-C, *infra*, we consider whether, and in what degree, Krc's claims are judicially reviewable.

3. *Egan's Relevance*

Our conclusion as to the limited scope of the FSGB's jurisdiction is buttressed by *Department of the Navy v. Egan*, 484 U.S. 518, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988), in which the Supreme Court found that the Merit Systems Protection Board ("MSPB") had no authority to examine the merits of the Navy's denial of a naval base employee's security clearance. According to the Court, an agency's security clearance determination

> is only an attempt to predict [an employee's] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States.

484 U.S. at 528-29. Describing the grant of a security clearance as a "[p]redictive judgment" that "must be made by those with the necessary expertise in protecting classified information," the Court explained that "the protection of classified information must be committed to the broad discretion of the agency responsible"; "outside nonexpert" bodies cannot, in the Court's view, "determine what constitutes an acceptable margin of error in assessing the potential risk." 484 U.S. at 529.

As Krc points out, *Egan* does not squarely control the FSGB's authority here. Most importantly, while the Navy

denied Egan a security clearance, Krc's security clearance was never officially revoked. Krc retains his clearance for domestic work; the agency has decided only that he will not be cleared for posting overseas.

The *nature* of USIA's decision here, however, is analogous to the Navy's decision in *Egan*. USIA's determination, like the Navy's, represented its "[assessment] whether, under compulsion of circumstances or for other reasons, [Krc] might compromise sensitive information." *Id.* at 528. Furthermore, the FSGB, statutorily composed of "independent" citizens "who are not employees of the Department [of State] or members of the [Foreign] Service," 22 U.S.C. § 4135(a), does not appear to be the kind of inside expert body that, *Egan* suggested, might be qualified to review the substance of the agency's decision. *See Egan*, 484 U.S. at 529. Although Dowling refused to predict whether Krc, if approached by hostile intelligence agencies, would reveal confidential information, Dowling vetoed any future overseas posting for Krc in order to "assure[] [himself] that [he] will never have to make that prediction." J.A. 577. Thus, Dowling left himself a large "margin of error in assessing [Krc's] potential risk." *Egan*, 484 U.S. at 529. *Egan* teaches plainly that review of the breadth of that margin is outside the authority of a nonexpert body such as the FSGB. This reading of *Egan* accords fully with the Tenth Circuit's interpretation, which precluded MSPB and district court review of the merits of the Air Force's suspension of an employee's security clearance, as well as of the nexus between the Air Force's rationale and national security interests. *Hill v. Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir.), *cert. denied*, 488 U.S. 825, 109 S. Ct. 73, 102 L. Ed. 2d 49 (1988).[4/]

[4/]In Hoska v. United States Dep't of the Army, 219 U.S. App. D.C. 280, 677 F.2d 131 (D.C.Cir. 1982), we reviewed the MSPB's affirmance of the Army's revocation of an employee's security clearance. We reversed on the grounds that the Army failed to show a sufficient nexus between Hoska's conduct and the revocation of his clearance. Id. at 144-45. While Egan, decided six years after Hoska, throws some doubt on Hoska's

(continued...)

In sum, the structure of the Foreign Service Act, seen through *Egan's* lens, persuades us that Krc's termination from the Foreign Service was not grievable before the FSGB. Finding that the Board lacked authority to consider Krc's complaint, we affirm the district court's refusal to enforce the Board's decision.

B. *APA Claim*

In the second count of his counterclaim, Krc contends that USIA's termination decision violated the APA's strictures against agency action that is

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right...;
> ...
> (D) without observance of procedure required by law; ...

5 U.S.C. § 706(2). We disagree.

The protections accorded by § 706 are available in all cases of agency action

> except to the extent that --
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

Id. § 701(a). The Foreign Service Act does not preclude judicial review of security clearance revocation or termination decisions by USIA. To prevail on his APA claim, therefore, Krc must demonstrate that USIA's actions in this case were not "committed to [its] discretion by law."

The Supreme Court has explained that § 701(a)(2) applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Webster v. Doe*, 486 U.S. 592, 599, 100 L. Ed. 2d 632, 108

[4/](...continued)
continued viability, Hoska remains distinguishable from the case before us because the Army's revocation decision was explicitly conduct-based. The instant case, therefore, does not require us to reconsider Hoska in light of Egan; we leave that task for another day.

S. Ct. 2047 (1988) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)). Under § 701(a)(2), review is precluded "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Webster*, 486 U.S. at 600 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985)). Above all, § 701(a)(2) requires us to examine carefully the statute on which the claim of illegal agency conduct is based. *Webster*, 486 U.S. at 600.

Section 611 of the Foreign Service Act states that except for reasons of misconduct, the Secretary of State "may terminate at any time" a limited Foreign Service appointment. 22 U.S.C. § 4011. This language imposes fewer shackles on the agency head's decisionmaking than the corresponding provision in the 1947 National Security Act, which the Supreme Court found precluded judicial review. *Webster*, 486 U.S. at 601.[5/] Furthermore, when Foreign Service members raise meritorious grievances and the Board recommends remedial action, the Secretary may reject the Board's recommendation "on the basis of a determination that implementation of the recommendation would be contrary to law or would adversely affect the *national security of the United States*." 22 U.S.C. § 4137(d) (emphasis supplied). We are left with little doubt, therefore, that the Act "fairly exudes deference" to the Secretary when Foreign Service personnel decisions implicate national security. *Compare Webster*, 486 U.S. at 600.

[5/]Section 102(c) of the National Security Act of 1947, 61 Stat. 498, as amended, states:

> [The] Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.

50 U.S.C. § 403(c) (1982).

Krc contends that by requiring "[a]ll personnel actions" to accord with "merit principles," 22 U.S.C. § 3905(a), the Act does provide a "meaningful standard" for review of his termination. We are not persuaded, however. Critically, revocation, modification, or dismissal of a security clearance is absent from the list of "personnel actions" that must conform to "merit principles." *See* 22 U.S.C. § 3905(a).[5/] Even if USIA's action with regard to Krc is construed as a decision related to an "assignment" or "separation," and, consequently, constitutes a "personnel action" to which "merit principles" apply, *see* 22 U.S.C. § 3905(a)(2)(A), (B), those principles do not afford protection from discrimination on the basis of sexual orientation. *See* 5 U.S.C. § 2302(b)(1). Nor, in light of the Act's mandate that Foreign Service officers be "available to serve in assignments throughout the world," 22 U.S.C. § 3901(a)(4), and the unreviewability of USIA's assessment of the national security risk presented by Krc's overseas posting, *see* Part II-A *supra*, do we have authority to rule that USIA's decision not to assign Krc overseas discriminated "on the basis of conduct which does not adversely affect the performance of the employee," 5 U.S.C. § 2302(b)(10). In short, the "merit principles" do not remove Krc's termination from the province of USIA's discretion.

We do find puzzling, however, the trial judge's dismissal of Krc's APA claim without any explanation. *See* May 31 Order, at 2, 5. Nonetheless, the language of § 611, particularly in the context of the Supreme Court's *Webster* decision, coupled with the inapplicability of the "merit principles," powerfully rebut Krc's argument. We therefore affirm the judge's summary dismissal of Count II of Krc's counterclaim.

[5/] While Krc's security clearance was never formally revoked, USIA's refusal to approve an overseas posting for him on security grounds was tantamount to a modification of his clearance. The FSGB considered USIA's actions in that light, see J.A. 58 (referring to USIA's "decision to revoke Krc's clearance for overseas assignment"); we have no reason to treat it differently.

C. *Constitutional Claims*

Counts III and IV of Krc's counterclaim asserted that USIA's termination decision deprived him of liberty and property without due process of law. We agree with the judge's dismissal of these contentions.

1. *Liberty Interest*

To demonstrate the claim that USIA deprived him of a liberty interest without due process, Krc must show that the agency altered his status in a tangible way, and that an imposition of stigma or injury to reputation accompanied this change in status. *Doe v. Cheney*, 280 U.S. App. D.C. 276, 885 F.2d 898, 910 (D.C. Cir. 1989); *Doe v. Casey*, 254 U.S. App. D.C. 282, 796 F.2d 1508, 1522-23 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988); *Doe v. Dep't of Justice*, 743 U.S. App. D.C. 354, 753 F.2d 1092, 1111 (D.C.Cir. 1985). Stated otherwise, this two-pronged standard requires Krc to show a "defamation ... accompanied by a discharge from government employment or at least a demotion in rank and pay." *Mosrie v. Barry*, 231 U.S. App. D.C. 113, 718 F.2d 1151, 1161 (D.C. Cir. 1983). Krc demonstrates neither discharge nor defamation.

Krc's limited Foreign Service appointment was terminated as of the close of business on March 2, 1985. Although Krc had to file some additional paperwork, he was appointed to USIA's domestic civil service the next day at an annual salary $ 333 higher than his Foreign Service salary. *See* Declaration of Harlan F. Rosacker, Brief for USIA at ii; J.A. 99. Krc retained his security clearance after the transfer. On this record, Krc's liberty interest claim must fail. Rehired by the same agency the day after his termination from overseas duty in a different capacity but with a pay increase, Krc cannot claim that he suffered a "loss of government employment" sufficient to constitute a constitutionally cognizable change of status. Even if he has lost the opportunity for employment in the Foreign Service, he has retained his job with USIA as well as his salary. *Cf. Mosrie*, 718 F.2d at 1161-62. The

"loss of some employment opportunities [does] not ... amount to an alteration of a legal right," *id.* at 1162, particularly when the loss of employment flows directly from the modification of a security clearance, which itself represents only a change in the terms of an agency's exercise of its discretion. *Egan*, 484 U.S. at 528; *compare Bartel v. FAA*, 223 U.S. App. D.C. 297, 725 F.2d 1403, 1415 (D.C.Cir. 1984) (remand to consider assertion of infringement of well-grounded legal right).

Nor can Krc show that "the government has actually stigmatized his ... reputation by, for example, charging [him] with dishonesty, and that the stigma has hampered future employment prospects." *Compare Doe v. Dep't of Justice*, 753 F.2d at 1111. USIA's termination letter explicitly stated that he was not disqualified from any future domestic government employment, J.A. 107, and the record contains no evidence that Krc's "attractiveness to potential employers" has been reduced. *Perry v. FBI*, 781 F.2d 1294, 1302 (7th Cir.), *cert. denied*, 479 U.S. 814, 93 L. Ed. 2d 25, 107 S. Ct. 67 (1986). Nor does Krc assert that the government has disseminated the cause of his termination; his complaint indicates that USIA's finding that he constituted an "intolerable" security risk was communicated to him alone. J.A. 235. *Compare Doe v. Dep't of Justice*, 753 F.2d at 1111-12. In any event, since Krc retains his security clearance for non-overseas use, USIA's actions do not expose him to the risk of other agencies or private employers blindly refusing to hire him on the basis of USIA's security determination. *Compare Doe v. Casey*, 796 F.2d at 1523 n. 67. As Krc makes out neither prong of our liberty interest test, we affirm the district court's dismissal of his liberty interest claim.

2. *Property Interest*

Krc contends that his "reasonable expectation of continued employment in the Foreign Service" constituted a property right of which USIA deprived him by terminating him without either a statement of reasons or fair opportunity to challenge

the termination. J.A. 235. He derived his "reasonable expectation" from USIA's own regulations, which, he claims, permit termination of his employment solely for unsatisfactory performance or for such cause as will increase the efficiency of the Foreign Service. Brief for Appellant ("Krc Br.") 44; Reply Brief for Appellant 13. Having failed to demonstrate that his conduct reduced the Service's efficiency, he argues, USIA did not meet its own criteria for termination.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source. ..." Board of Regents v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). The Foreign Affairs Manual ("F.A.M.") spells out the parameters of the property rights in employment enjoyed by Foreign Service Limited Appointees, such as Krc:

> An employee with a Foreign Service Limited appointment may be separated on a date specified in the personnel action effecting the employee's appointment; when the program for which the employee was appointed expires; when the need no longer exists for the employee's services; or when the employee fails to perform duties satisfactorily.

3 F.A.M. § 712 (1984) (emphasis in original). This provision accords with other official guidelines and manuals providing that limited appointees may be terminated "for such cause as will promote the efficiency of the Service." See, *e.g.*, 22 U.S.C. § 4010(a)(1); 3 F.A.M. § 767.1; USIA Manual of Operations and Administration § 351.4(d) (1984); *see also id.* § 454.5(t) (performance evaluations may not discuss "[outside] activities which are not relevant to performance or post effectiveness"). Career candidates who complete their probationary limited appointment "can be expected to be commissioned as Foreign Service Officers by the 4th year of their probationary appointment, following approval by the Commissioning and Tenure Board." United States Department of State, *et al.*, *Foreign Service Careers* 13 (June 1984).

These guidelines suggest that Krc's property interest in his limited appointment is a circumscribed one. *Cf. Colm v. Vance*, 186 U.S. App. D.C. 132, 567 F.2d 1125, 1129-32 (D.C.Cir. 1977) (describing limited property right of Foreign Service members during time-in-class period). Subject to the "merit principles" governing "personnel actions," *see* 22 U.S.C. § 3905; *Colm*, 567 F.2d at 1131-32; Part II-A, *supra*, USIA retains discretion to determine "when the need no longer exists for the employee's services" or when continued employment would not "promote the efficiency of the Service." Krc concedes that he could be terminated for "such cause as will promote the efficiency of the Service." 22 U.S.C. § 4010(a)(1); Krc Br. 44. Since Foreign Service members "should be ... available to serve in assignments throughout the world," 22 U.S.C. § 3901(a)(4), the continued employment of a member whose overseas security clearance has been revoked would not "promote the efficiency of the Service." Provided that USIA notifies the employee by letter at least thirty days before the impending separation, 3 F.A.M. § 715, withdrawal of a member's overseas security clearance furnishes grounds consistent with the merit principles for USIA to determine that "the need no longer exists for the employee's services." Unfortunately for Krc, since no independent property right attaches to the security clearance, the merits of USIA's withdrawal of a security clearance are beyond review. *Egan*, 484 U.S. at 528-29; *see* Part II-A, *supra*.

By letter dated January 25, 1985, USIA's Personnel Director informed Krc that his limited appointment would be terminated effective February 28, 1985; in light of the decision by USIA's Security Director that Krc "cannot be given any overseas assignment," the Personnel Director concluded that "there is ... no need for your services in the Foreign Service." J.A. 107. Having timely notified Krc of his impending termination, and having terminated him on a ground expressly provided in its own regulations, USIA did not deprive Krc of property without due process. We

therefore affirm the trial judge's dismissal of Krc's property interest claim.

D. *Other Constitutional Claims*

According to Krc, the district court failed to consider his claim that USIA's termination decision denied him equal protection. We agree, and therefore remand this issue to the district court.

In Count II of his initial August 1987 counterclaim, Krc alleged that USIA's actions violated the APA in part because they were "contrary to constitutional right." J.A. 234-35. Concluding from the district court's April 20, 1989 opinion that this opaque phrase had not alerted the court to his equal protection claim, Krc filed an amended counterclaim on May 1, 1989, spelling out explicitly in Count V his equal protection argument. J.A. 238, 246-47. This amended counterclaim, however, was never docketed, *see* J.A. Tab 1, and the district court made no reference to Count V in its May 31 Order.

The district court's failure to consider the amended counterclaim was error. Under the Federal Rules of Civil Procedure, parties may amend their pleadings "once as a matter of course at any time before a responsive pleading is served. ..." Fed. R. Civ. P. 15(a). Motions for summary judgment or dismissal, however, do not constitute responsive pleadings that prevent a party from amending without leave of court. 6 Wright & Miller, *Federal Practice and Procedure* § 1483, at 585-87 (1990); *Horn & Hardart Co. v. National Rail Passenger Corp.*, 269 U.S. App. D.C. 53, 843 F.2d 546, 549 (D.C.Cir.), *cert. denied*, 488 U.S. 849, 109 S. Ct. 129, 102 L. Ed. 2d 102 (1988) (motion to dismiss is not a responsive pleading). USIA never answered Krc's original counterclaim, but filed only motions for summary judgment and dismissal. As of May 1, moreover, the court was still considering two counts of the initial counterclaim. *Cf.* 6 Wright & Miller, *supra*, at 588-91 (parties may generally amend as of right within reasonable time after order dismissing complaint entered). Krc, therefore, retained the

right to amend his counterclaim on May 1, and his amended counterclaim was properly before the district court.

On June 2, 1989, Krc moved to file a second amended counterclaim, apparently to spell out his equal protection claim more fully. On July 21, the district court denied the motion on the grounds that the court had no more jurisdiction, having ordered the case dismissed from the court's docket on May 31. *United States Information Agency v. Krc*, No. 87-1740 (D.D.C. July 21, 1989) (order). Since the court should have considered Krc's May 1 amended counterclaim, Krc's June 2 motion was irrelevant. We therefore vacate the court's July 21 order.

As noted, the court's May 31 order was silent as to Krc's equal protection claim -- Count V of his amended counterclaim. It also made no mention of Count VI of his amended counterclaim,[2/] which alleged that USIA "deterred and prevented [Krc] from pursuing other part-time or full-time employment opportunities outside USIA." J.A. 247-48. Both of these claims should be considered in the first instance by the district court. We therefore remand the case for the court's consideration of these two claims.

III. CONCLUSION

To sum up: we affirm the district court's denial of enforcement of the FSGB's order, as well as the court's dismissal of Krc's APA, liberty-interest, and property-interest claims. We remand for the district court to consider Krc's claims concerning equal protection and interference with pursuit of employment -- Counts V and VI of his amended counterclaim.

A final word, however, is in order. The statutorily ordained unreviewability of USIA's security clearance determination, coupled with the breadth of the agency's discretion in termination decisions concerning limited appointees, underscore the critical importance of judicial

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[2/]This Count is styled "Count IV" but appears after Count V. We assume that "Count IV" is a typographical error and should read "Count VI."

authority to consider the constitutional claims resulting from agency personnel decisions. As this case illustrates, those constitutional claims may well be the *only* check on agency actions that determine a person's career fortunes. Courts have an obligation to listen to those claims clearly and to consider them carefully. *See Webster v. Doe*, 486 U.S. at 601. We urge the district court to consider our remand in this light.

So ordered.

Separate Statement of WALD, *Chief Judge*: I think the analysis and result of the court's opinion are consistent with the statutory scheme that Congress has established. Nevertheless, I find highly disconcerting the notion that government agencies can terminate outstanding civil servants without any substantive review simply by invoking "national security." The possibility of unreviewable agency "security officers" giving effect to homophobic or other biases is all too apparent. Congress clearly has the authority to provide for substantive review of security clearance determinations, *Department of the Navy v. Egan*, 484 U.S. 518, 530, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988); I hope that this case will encourage it to consider such a course.

Separate Statement of MIKVA, *Circuit Judge*: I share the concerns expressed by Chief Judge Wald in her separate statement. No one can be comfortable with the process that has been afforded the federal employee in this case, even though it may be all the process that is due under the statute. I too hope that Congress will revisit the statutory scheme and provide federal employees with a better plan.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Information Agency,	:	**Filed Aug 15, 1991**
Plaintiff,	:	
v.	:	CIVIL ACTION NO. 87-1740
Jan Krc,	:	
Defendant	:	

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

I. BACKGROUND

This case arose out of a decision by the United States Information Agency ("USIA") to terminate the Foreign Service assignment of Jan Krc based on a determination by the USIA Office of Security that he posed a security risk because he engaged in certain homosexual conduct while on assignment in Belgrade.[1/] Krc appealed the termination of his Foreign Service appointment to the Foreign Service Grievance Board ("FSGB"), which ordered that he be reinstated. USIA then sued in this Court to set aside FSGB's action. Krc counterclaimed, alleging violations of statutory rights under the APA as well as constitutional due process violations. By Opinion and Order, this Court found for the USIA and dismissed the defendant's counterclaims. *United States v. Krc*, No. 87-1740 (D.D.C. Apr. 30, 1989) ("*Krc*");

[1/] After terminating Krc from the Foreign Service, USIA appointed him to a civil service position.

United States Information Agency v. Krc, No. 87-1740 (D.D.C. May 31, 1989). The Court of Appeals affirmed in part, but remanded the case for consideration of two claims not addressed by this Court--violations of equal protection and interference with pursuit of employment.[2/] *United States Information Agency v. Krc*, 905 F.2d 389, 399-400 (D.C. Cir. 1990) ("*USIA*"). In addition, the Court must consider the reprisal claim which Krc added on remand. Krc requests equitable relief only.[3/]

Now before the Court is USIA's Motion to Dismiss the Second Amended Counterclaim[4/] or, in the Alternative, for Summary Judgment. Upon consideration of plaintiff's motion, the supporting and opposing memoranda, the applicable law, and the entire record herein, the Court shall grant USIA's motion and dismiss this case from the dockets of the Court.

II. Analysis

A. Count I--Equal Protection

Krc alleges in Count I of his Second Amended Counterclaim that "USIA's termination of [him] from the Foreign Service deprived [him] of the equal protection of the law in violation of the Fifth Amendment." Second Amended

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[2/]Krc filed a first amended counterclaim after the Court's April 20, 1989 Opinion to clarify his claims, but the amended counterclaim inadvertently was never docketed nor considered by the Court.

[3/]At the hearing on USIA's motion to dismiss or for summary judgment, Krc voluntarily withdrew any claims for monetary damages. See *United States Information Agency v. Krc*, No. 87-1740 (D.D.C. June 13, 1991) (order).

[4/]Counts I and II of the Second Amended Counterclaim comprise Krc's equal protection and interference with pursuit of employment claims. In a June 18, 1991 memorandum, Krc stated for the first time that Count II also encompassed a libel claim based on a deprivation of due process. However, this memorandum was submitted after oral argument on the pending dispositive motion and long after the USIA answered Krc's second amended counterclaim and filed its dispositive motion. As discussed, *infra*, p. 10, the Court shall dismiss Krc's new libel claim under Count II.

Counterclaim ·para. 21. Krc lists four bases for his equal protection claim: (i) USIA's termination decision "was based upon arbitrary, capricious, and irrational discrimination and prejudice against Krc's sexual orientation and conduct, factors that have no relationship to Krc's ability to perform the duties of a Foreign Service officer or to his trustworthiness and loyalty to the United States;" (ii) it "had the effect of punishing or injuring Krc more severely for conduct that did not violate agency policy or foreign law than other Foreign Service officers have been punished or injured for conduct that did not violate agency policy or foreign law;" (iii) USIA's decision "was based on a policy of considering homosexual conduct, but not heterosexual conduct, as always constituting a negative factor in security approval decisions, regardless of susceptibility to blackmail;" and (iv) "because other USIA Foreign Service officers of the same sexual orientation as Krc and in situations analogous to Krc's have not been similarly denied security approval to serve in overseas assignments or been terminated from USIA's Foreign Service." Id.

Krc's equal protection claim cannot survive summary judgment[5/] because the Court has previously found that USIA's decision to terminate Krc was based on his particular conduct, and not on any policy against homosexuals in general. Although the first and third allegations theoretically might state a viable claim in another case, the Court already has determined that USIA "did not deny defendant security clearance approval for overseas service because of his homosexuality, but because of the particular homosexual conduct that he engaged in while in Belgrade." *Krc*, slip op. at 17. The Court found that the facts in this case paralleled those in *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986), *rev'd on other grounds*, 488 U.S. 592 (1988)--that USIA terminated Krc's Foreign Service appointment because "'his

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[5/]Because USIA's motion refers to matters outside the pleadings, the Court shall treat it as a motion for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(b).

homosexuality presented a security risk not necessarily presented by all other homosexuals.'" *Krc*, slip op. at 17 (quoting Doe, 796 F.2d at 1523); *see also*, *Krc*, slip op. at 4 (the Security Officer "found that [Krc's] actions demonstrated 'poor judgment and lack of discretion,' but also found that [Krc] was 'an intolerable security risk' because his homosexuality made him highly susceptible to blackmail"); *USIA*, 905 F.2d at 394 ("Krc was terminated from the Foreign Service because ... his homosexuality made him 'an intolerable security risk,' not because Krc had violated a canon of conduct governing Foreign Service officers"). Because the Court has already found a rational basis[6/] for USIA's action, Krc's first allegation of an equal protection violation fails.[7/] Moreover, Krc's third ground for his equal protection claim fails because even assuming, *arguendo*, that the USIA did have a policy of considering homosexual

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[6/]The Court must deny Krc's request to present evidence that homosexuality should be treated as a suspect or quasi-suspect classification to which a more exacting standard of review than the rational basis test should be applied. The Court is bound by precedent holding that the rational basis test is appropriate for classifications based on sexual orientation. *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987). *See also*, *Bowers v. Hardwick*, 478 U.S. 186 (1986); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 574, reh'g denied, 909 F.2d 375 (9th Cir. 1990) (homosexuality does not present a suspect or quasi-suspect class); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). Indeed, Krc explicitly stated, "in making this request, Krc subscribes to the argument made by the plaintiff on remand in *Doe v. Webster*, C.A. 82-2016-AER." See February 15, 1991 Memorandum of Jan Krc in Opposition to Plaintiff's Motion to Dismiss or, in the Alternative, for Summary Judgment ("Opposition") at 16, n.6. However, the opinion later rendered in *Webster* found that the rational basis test applied to the plaintiff's equal protection claim arising from his termination based on his homosexual conduct. *Doe v. Webster*, C.A. 82-2016, slip. op. at 2-5 (D.D.C. June 4, 1991).

[7/]In its Opinion of April 20, 1989, the Court did not enter its findings lightly or on an inadequate record. In large part through *in camera* submissions, USIA presented the Court with the basis for its action. The Court's review of those submissions reconfirms its earlier decision. Accordingly, the request by Krc at the June 12, 1991 hearing that the Court reconsider the findings in its April 20, 1989 Opinion is denied.

conduct, and not heterosexual conduct, as "always constituting a negative factor in security approval decisions," the Court determined in its April 30, 1989 Opinion that the basis of USIA's decision was not such a policy, but rather, Krc's particular homosexual conduct. *See supra* note 7.

Krc's second and fourth allegations fail to establish an equal protection claim. Krc's fourth argument, that other homosexual Foreign Service officers have not been denied security approval to serve in overseas assignments or have been terminated from the Foreign Service, supports the finding that USIA's action was based not on a general anti-homosexual policy, but on particular considerations relating to Krc and his conduct. Krc's second allegation--that his termination "had the effect of punishing [him] more severely for conduct that did not violate agency policy or foreign law than other Foreign Service officers have been punished or injured for conduct that did violate agency policy or foreign law"--is not well-pleaded. However, an allegation of unfair treatment because others have avoided punishment by lying fails to state a claim under the equal protection clause. Moreover, the Court has found that there was a rational basis for USIA's action. See supra notes 6-7 and accompanying text.

B. Count II-Interference with Pursuit of Employment

In Count II of the Second Amended Counterclaim, Krc alleges that the USIA prevented him from pursuing other employment opportunities and has intentionally interfered with his prospective employment opportunities and business advantage. This claim arises out of Krc's failure to obtain a part-time position with William Gray Associates for work on a contract with the Defense Intelligence Agency. Before Krc could qualify for such work, the Defense Industrial Security Clearance Office ("DISCO") had to convert his security clearance to an industrial security clearance. It is not disputed that in May 1988, DISCO submitted to USIA's Office of Security ("OS") a form letter inquiring about Krc's security clearance. In response to one question whether

"adverse information was developed subsequent to issuance" of Krc's security clearance, the OS staff checked "yes" on the form letter. Krc ultimately did not get the job, and claims that OS' action wrongfully prevented him from pursuing employment opportunities outside the USIA.

The government argues, and the Court agrees, that sovereign immunity bars Krc's claim, and moreover, that summary judgment is warranted. Krc's claim of interference with prospective business advantage is based on a "general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract, unless the interference is not improper under the circumstances." *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1154-55 (D.C. Cir. 1985) (quoting Restatement (Second) of Torts § 766, comment b (1979)).

It is well-established that, as sovereign, the United States cannot be sued without its consent. *United States v. Testan*, 424 U.S. 392, 399 (1976). The terms of the sovereign's consent define the court's jurisdiction to entertain suit. *Id.*; *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). Any waiver of sovereign immunity must be "unequivocally expressed." *Id.* at 161.

The Federal Tort Claims Act ("FTCA") does not waive sovereign immunity for "claims arising out of ... interference with contract rights." 28 U.S.C. § 2680(h). Krc's claim is analogous to that in *Art Metal-U.S.A., supra*, in which the Court of Appeals held that claims for interference with prospective advantage are barred under FTCA § 2680(h). 753 F.2d at 1155. As the Court reasoned:

> "[t]o hold that interference with prospective advantage does not rise out of interference with contract rights under section 2680(h) would subject the government to liability if its employees interfered with the [claimant's] mere expectation of entering a contract, but not if they interfered with a contract already in existence. Such a result would be illogical and contrary to the 'words and reason of the exception.'"

Id. (citations omitted).

Without citing any caselaw, Krc argues that because he seeks declaratory and injunctive relief, the Administrative Procedure Act ("APA"), irrespective of the FTCA, waives sovereign immunity for his interference with prospective business advantage claim. However, while APA § 702 provides a limited waiver of sovereign immunity in actions for equitable relief,[8/] the APA confers no jurisdiction where another statute expressly or impliedly forbids the relief which is sought.[9/] Here, Krc's claim sounds in tort, and because "[t]he Tort Claims Act is the exclusive remedy for claims sounding in tort" and "impliedly forbids the relief which is sought," the Court lacks jurisdiction over Krc's interference with prospective business advantage claim. *See United States v. Olin Corp.*, 606 F. Supp. 1301, 1312 (N.D. Ala. 1985); *see also* FTCA, 28 U.S.C. §§ 2679(b)(1) (providing that the remedy against the United States is "exclusive of *any other civil action* or proceeding for money damages") (emphasis added); § 2680 ("The provisions of this chapter and section

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[8/]Section 702 of the APA provides, in pertinent part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. ..."

[9/]APA § 702 further provides: "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

1346(b) of this Title shall not apply to ... (h) Any claim arising out of ... interference with contract rights").[10/]

Even assuming, *arguendo*, that Krc's employment interference claim were not jurisdictionally barred, the USIA is entitled to summary judgment. Krc has failed to demonstrate that OS' action of checking "yes" in response to a question on the DISCO form letter gives rise to a cause of action. The action by the OS staff in response to the question of whether adverse information was developed subsequent to the issuance of Krc's security clearance was no more than an accurate response[11/] to an authorized inquiry and thus was "proper under the circumstances." *Art Metal-U.S.A.*, 753 F.2d at 1154.[12/]

Finally, the Court also must address Krc's new-found libel claim under Count II of the Second Amended Counterclaim. Krc first raised his libel claim in a submission after oral argument on USIA's motion for summary judgment, long after the motion was ripe and still longer after USIA answered Krc's Second Amended Counterclaim. Count II of Krc's counterclaim does not mention a libel theory, and viewing Krc's June 18, 1991 submission as a motion to amend his pleading pursuant to Fed. R. Civ. P. 15, it must be denied as untimely and prejudicial. Krc has had more than sufficient opportunity to develop his legal theories, and

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[10/] *C.f. Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) ("The waiver of sovereign immunity in the Administrative Procedure Act does not run to actions seeking declaratory relief ... in contract cases, because that waiver is by its terms inapplicable if 'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,' 5 U.S.C. § 702, and the Tucker Act and Little Tucker Act impliedly forbid such relief").

[11/] *See* supra note 7.

[12/] USIA's regulations implementing the Privacy Act, 5 U.S.C. § 552a, authorize the agency to disclose "relevant data" to "duly authorized security agencies" concerning "significant security information in the file of a USIA employee or applicant." 55 Fed. Reg. 31962, 31963 (August 6, 1990).

allowing the addition of a libel claim at this late stage would seriously prejudice USIA.[13] See 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1487 at 613, 623 (1990) (and cases cited therein).[14]

C. Count III--Reprisal

Under Count III of his Second Amended Counterclaim, Krc claims that the USIA violated a provision of the Foreign Service Act by refusing to approve him for an excursion tour to the United States consulate in Bratislava, Czechoslovakia, in retaliation for his earlier grievance. Krc alleges that in February 1990, he applied for the excursion tour with the support and recommendation of the USIA European Area. Allegedly, OS later refused to approve Krc for the position, and therefore there was no reason for the European Area to make a formal recommendation on behalf of Krc. *See* Second Amended Counterclaim paras. 17-19.

The government persuasively argues that this Court lacks jurisdiction over Krc's reprisal claim. The Foreign Service Act, 22 U.S.C. § 3901 *et seq.* (1988), broadly defines "grievances" that current members of the Foreign Service may bring at the administrative level,[15] and provides for grievances "in the nature of reprisal." § 4131(a)(1)(F).

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[13]To allow Krc to pursue a new libel claim at this late date also would in effect encourage sandbagging.

[14]Even if the Court were to allow Krc to pursue a libel claim, it would appear to be futile. *See supra* notes 7, 12. To the extent that Krc contends that his libel claim arises under the Fifth Amendment, all of his Fifth Amendment claims have been decided. If Krc were to make a common law libel claim, it would not fall within the waiver of sovereign immunity contained in the FTCA. *See* 28 U.S.C. § 2679(b)(1), 2680(h); *see also*, *supra* p. 8-9.

[15]Section 4131(a)(1) provides, in pertinent part: "The term 'grievance' means any act, omission, or condition subject to the control of the Secretary [of State] which is alleged to deprive a member of the [Foreign] Service who is a citizen of the United States of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member."

However, as to *former* members of the Foreign Service, the statute limits grievances that may be filed at the administrative level to "allegations contained in section 4131(a)(1)(G)," which involve the denial of an allowance, premium pay, or other financial benefit. § 4132.

Because Congress excluded former members of the Foreign Service, such as Krc, from the administrative process for reprisal claims, the preclusion of administrative review also by implication precludes judicial review of such claims. The Court finds that *United States v. Fausto*, 484 U.S. 439 (1988), and *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), inescapably support USIA's argument. *Fausto* held that the Civil Service Reform Act ("CSRA"), which precluded administrative and judicial review of suspensions for misconduct for certain employees in the excepted service, precluded judicial review for those employees under the Tucker Act based on the Back Pay Act. The High Court examined the purpose and text of the statute, as well as the structure of review, and concluded that the absence of an administrative review system for excepted service employees reflected a "congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by" the CSRA. "The Foreign Service Act is intended to be a companion measure" to the CSRA at issue in *Fausto*, and was "designed to strengthen and improve the Foreign Service" much like the CSRA was designed to improve the management and efficiency of the Federal Civil Service. Senate Report No. 96-913, *reprinted* in 1980 U.S. Code Cong. & Admin. News 4419.

In addition, *Block* held that the Agricultural Marketing Agreement Act, which restricted administrative review of milk market orders to challenges by milk handlers, by implication precluded milk consumers from obtaining direct judicial review of the Secretary of Agriculture's milk orders. The Court expressly stated:

> "Had Congress intended to allow consumers to attack provisions of marketing orders, it surely would have required them to pursue the administrative remedies

> provided in [7 U.S.C.] § 608c(15)(A) as well. The restriction of the administrative remedy to handlers strongly suggests that Congress intended a similar restriction of judicial review of market orders."

467 U.S. at 347.

The Court is mindful of the well-established principle of statutory construction that "Congress will be presumed to have intended judicial review of agency action to be available unless there is 'persuasive reason' to believe otherwise." *Fausto*, 484 U.S. at 452 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). However, "the presumption favoring judicial review is not to be applied in the 'strict evidentiary sense,' but may be 'overcome whenever the congressional intent to preclude review is fairly discernible in the statutory scheme.'" *Fausto*, 484 U.S. at 452 (quoting *Block*, 467 U.S. at 351).[16/] Here, the presumption favoring judicial review is overcome by the inferences from the statutory scheme that Congress precluded grievances sounding in reprisal by former members of the Foreign Service.[17/]

[16/]Even if the Court had the power to enter a declaratory judgment in this case as requested, such a remedy would nullify the statutory scheme designed by Congress to allow USIA to manage personnel matters which are often intimately bound up with national security concerns. That Congress precluded judicial review of Krc's reprisal claim may well reflect the judgment that Courts lack the expertise and competence to be closely involved in personnel matters of agencies such as the USIA in cases like this. However, the Court is not comfortable with the process that has been afforded the federal employee in this case, even though it is all that he is due under the statute. The Court shares the precatory wish of his esteemed colleagues on the Court of Appeals "that Congress will revisit the statutory scheme and provide federal employees with a better plan." *USIA*, 905 F.2d at 400 (Separate Statement of Mikva, J.); *see id.* (Separate Statement of Wald, C.J.).

[17/]Under § 4140, "[t]he standard of judicial review is contained in 5 U.S.C. § 706," Senate Report No. 96-913, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4419, 4511, but the protections accorded by § 706 are not available where a statute precludes judicial review. Here, the Foreign Service Act itself precludes judicial review of reprisal claims by

(continued...)

Even assuming, *arguendo*, that the Court had jurisdiction over Krc's reprisal claim, it fails to survive USIA's motion for summary judgment. A court shall grant summary judgment where "there is no genuine issue of material fact ... and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must credit the nonmovant's evidence and draw all justifiable inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the nonmoving party may not rest upon a mere denial, but rather must set forth specific facts, by affidavits or otherwise, showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

An issue central to Krc's reprisal claim is whether USIA's Office of Security in some way vetoed Krc's application for the excursion tour to Czechoslovakia *because* he had filed an earlier grievance.[18/] While USIA has articulated non-discriminatory reasons for not appointing Krc to the excursion tour,[19/] Krc has failed to provide any admissible evidence of retaliatory intent. As the Supreme Court has directed:

[17/](...continued)
former members of the Foreign Service. *See supra* p. 11-14. While § 4140 provides judicial review of a "grievance" after "final action" by the Secretary of State or Foreign Service Grievance Board, the statute severely limits the range of grievances that may be filed by former members of the Foreign Service, *see supra* p. 11, and thus limits the scope of "final action" at the agency level which gives rise to judicial review. In the same manner, § 4133(a), which provides for reprisal claims by "any individual filing a grievance under this subchapter," is limited as to former members of the Foreign Service by other statutory provisions. *See* § 4131(a)(1)(G).

[18/]*See McKenna v. Weinberger*, 729 F.2d 783, 790-91 (D.C. Cir. 1984) (Title VII). Even assuming, *arguendo*, that Krc could establish a *prima facie* case of reprisal, he has presented no evidence that the legitimate, nondiscriminatory reasons proffered by USIA to explain its action were pretextual.

[19/]See, e.g., Plaintiff's January 16, 1991 Statement of Material Facts Not in Dispute paras. 11-13; see also supra note 7.

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).[20/] Accordingly, USIA warrants summary judgment on Krc's reprisal claim.

III. Conclusion

For all of the foregoing reasons, the Court shall grant the USIA's Motion to Dismiss or for Summary Judgment. The Court shall issue an Order of even date herewith in accordance with this Opinion.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

DATE: August 12, 1991

[20/]The Court commends the spirited and skillful public service provided by plaintiff's counsel throughout this litigation, but there comes a time when a case has been fully and adequately litigated and must be brought to a close. That time has come to pass, and even if the Court had the power, it would be reluctant to grant Krc's request to pursue further discovery on his claims pursuant to Fed. R. Civ. P. 56(f).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Information Agency,	:	**Filed August 15, 1991**
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 87-1740
Jan Krc,	:	
	:	
Defendant	:	

ORDER

In accordance with the Court's Opinion issued of even date herewith, it is, by the Court, this 12th day of August, 1991,

ORDERED that the Motion to Dismiss or for Summary Judgment filed by the plaintiff USIA shall be, and hereby is, granted; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, dismissed from the dockets of the Court.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

DATE: August 12, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	:	**FILED APR 20 1989**
Plaintiff,	:	
v.	:	CIVIL ACTION NO. 87-1740
Jan Krc,	:	
Defendant.	:	

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

INTRODUCTION

The genesis of this suit was Jan Krc's filing of a grievance with the Foreign Service Grievance Board ("FSGB"). The grievance concerned the United States Information Agency's ("USIA") termination of his limited appointment to the Foreign Service based on its finding that the assignment of defendant overseas was not in the best interests of the national security. The Foreign Service Grievance Board found that it had jurisdiction to entertain Krc's grievance, and, at the conclusion of an evidentiary hearing, concluded there was no rational connection between USIA's decision to withdraw Krc's security approval for overseas service and the national security. As such, the FSGB directed the USIA to reinstate Krc as a limited appointee of the Foreign Service.

USIA filed this suit to set aside the FSGB's decision on the ground that the FSGB had no authority to review the termination of Krc's limited appointment or the merits of USIA's security determination. Thereafter, Krc filed a counterclaim alleging that USIA was in violation of the

Foreign Service Act and the Administrative Procedure Act for failing to enforce the decision and order of the FSGB. In his counterclaim, Krc also claimed that USIA deprived him of liberty and property without due process of law in violation of his Fifth Amendment rights.

Now before the Court is plaintiff's motion for summary judgment and for dismissal of defendant's counterclaim. Also before the Court is defendant's motion to dismiss the complaint and for summary judgment on Count I of his counterclaim. Count I seeks the enforcement of the decision and order of the FSGB directing the USIA to reinstate defendant as a limited appointee in the Foreign Service. After careful consideration of these motions, the supporting and opposing legal memoranda, and the underlying law, the Court will grant plaintiff's motion for summary judgment because the FSGB lacked jurisdiction to review the merits of USIA's security determination or to order defendant's reinstatement as a limited appointee in the Foreign Service. The Court will also grant, in part, plaintiff's motion to dismiss defendant's counterclaim. Specifically, the Court will grant plaintiff's motion to dismiss as it pertains to Count I of defendant's counterclaim, which seeks enforcement of the FSGB decision and order and Count IV, which alleges that plaintiff's termination of defendant from the Foreign Service deprived defendant of property without due process of law.

The Court, however, will deny plaintiff's motion to dismiss with respect to Counts II and III of the counterclaim, which allege that plaintiff's termination of defendant violated defendant's constitutional rights by depriving him of liberty without due process of law.

BACKGROUND

Defendant Krc, a native of Czechoslovakia and a naturalized citizen of the United States, entered the Foreign Service as a limited appointee in 1982. After spending the first year of his appointment in Washington, D.C., defendant was posted to Belgrade, Yugoslavia. Prior to his departure, defendant was briefed on USIA's policy on social relations

with foreign nationals. During this briefing, defendant allegedly was told that the government policy forbade "intimacy" with foreign nationals. Once in Belgrade, however, defendant was told, in the course of a security briefing, that the government policy on social relations with foreign nationals was considerably relaxed in Yugoslavia. Defendant was told that foreign nationals could have casual sex with non-Americans, but could not have serious relationships.

While in Yugoslavia, defendant had several homosexual affairs. When he returned to the United States in July, 1984, defendant was debriefed about his contacts with foreign nationals, and when asked about his homosexual contacts, admitted that he was a homosexual and had a number of homosexual affairs. This was brought to the attention of USIA's Personnel Director and Security Officer.

USIA's Personnel Director sent defendant a letter advising him that he had violated the USIA fraternization policy for the Yugoslav post. In this letter, she also threatened to terminate defendant's foreign service appointment based on his "misconduct" which demonstrated "insubordination, irresponsibility, poor judgment and lack of discretion. "When the Personnel Director met with defendant, defendant told her that he was never told of a prohibition against sex between foreign service officers and Yugoslav nationals; defendant provided corroboration for this statement. After her meeting with defendant, the Personnel Director withdrew her recommendation that defendant be terminated. Instead, she issued an official letter of reprimand, which was to remain in defendant's file for two years, and recommended his posting to Manila.

The Security Officer's views differed from those of the Personnel Director. Like the Personnel Director, he found that defendant's actions demonstrated "poor judgment and lack of discretion," but also found that defendant was "an intolerable security risk" because his homosexuality made him highly susceptible to blackmail. As such, he stated that he would not approve any foreign service posting for defendant.

The Personnel Director then terminated defendant's foreign service appointment, stated that the termination was not a disciplinary action, and placed defendant in a civil service classification at the USIA in the United States; defendant maintained his top secret security clearance for his new position.

On February 13, 1985, defendant filed a grievance with the Foreign Service Grievance Board. He claimed that he was terminated from the Foreign Service for misconduct, and was entitled to a hearing to establish the cause for the termination. He also claimed that he had a right to file a grievance under Section 1101 (a) of the Foreign Service Act because the termination violated merit principles.

At the conclusion of a two day evidentiary hearing, the FSGB held that although the termination of a limited appointment may not be grieved under Section 610(a) of the Act, the underlying security determination was independently grievable under Section 1101(a) of the Act.[1/] After reviewing USIA's security determination, the FSGB concluded that there was no rational nexus between the USIA's decision to withdraw defendant's security approval for

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[1/]Section 1101(a)(1) of the Act defines a grievance as:

> any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service who is a citizen of the United States of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member.

22 U.S.C. § 4131(a)(1) (Supp. 1981). That provision of the Act also lists a series of examples of grievable matters which can be brought before the Board.

Section 1101(b) limits the definition of grievable matters by listing a series of occurrences that are not grievable. Included in that list is "the termination of a limited appointment under section 4011 of this title." *Id.* at § 4131(b). Section 4011 of Title 22 provides that with the exception of terminations based on misconduct, "the Secretary may terminate at any time the appointment of any member of the Service serving under a limited appointment who is in the Senior Foreign Service, who is assigned to a salary class in the Foreign Service Schedule . ..."

overseas service and the national security and, therefore, issued an opinion and order on March 19, 1987 directing the USIA to reinstate defendant as a limited appointee in the Foreign Service.[2/] Thereafter, on June 25, 1987, plaintiffs filed this suit asking the Court to set aside the decision and order of the Board.[3/]

THE COURT WILL GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE FOREIGN SERVICE GRIEVANCE BOARD LACKED AUTHORITY TO REVIEW USIA'S SECURITY DETERMINATION AND TO ORDER DEFENDANT'S REINSTATEMENT AS A LIMITED APPOINTEE IN THE FOREIGN SERVICE.

Under Section 611 of the Foreign Service Act, only certain members of the Foreign Service must receive a hearing before the Foreign Service Grievance Board prior to their termination. 22 U.S.C. § 4010(a)(2) (Supp. 1988). All career or tenured members of the Foreign Service are entitled to a hearing before the Board prior to their termination from the Foreign Service. In contrast, limited appointees or non-tenured members of the Service are only entitled to a hearing before the Board when the "separation is to be by reason of misconduct." *Id.* With the exception of terminations for misconduct, foreign service officers with limited appointments can be terminated "at any time." *Id.* at § 4011. On the basis of these provisions of the Act, the plaintiff argues that the

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[2/] *Jan Krc v. United States Information Agency*, FSGB ROP No. G-85-012-USIA-1, at 8 (March 19, 1987).

[3/] As a procedural matter, it should be noted that plaintiff was not obligated to comply with the remedial order entered by the Board because it sought judicial review of that order. Section 1107(c) of the Act provides that "[e]xcept as provided in subsection (d) of this section, decisions of the Board under this subchapter shall be final, subject only to judicial review as provided in section 4140 of this title." 22 U.S.C. § 4137(c) (Supp. 1988). *See* S. Rep. No. 913, 96th Cong., 2d Sess. at 92, *reprinted in* 1980 U.S. Code Cong. & Admin. 4419, 4510 (explaining that this provision of the Act means that an agency must comply with the Board's remedial orders "unless it seeks judicial review").

Grievance Board has no jurisdiction to review defendant's termination.[4/]

Defendant disagrees with plaintiff's interpretation of the Board's jurisdiction. Defendant argues that, while the Act authorizes the Secretary to terminate a limited appointee "at any time," the Act does not authorize the Secretary to terminate a limited appointee for any reason. Defendant asserts that the Secretary's authority to terminate his appointment is limited to the extent that the Secretary may not terminate him for grounds that are expressly prohibited by the Foreign Service Act or other applicable law. As such, defendant contends that the Grievance Board may review the termination to ensure that the Secretary has obeyed this limitation.[5/]

Although the language of the Foreign Service Act expressly prohibits the Board's review of the termination of a limited appointment, the language of the Act leaves unresolved whether a limited appointee can file a grievance challenging the reasons underlying his or her termination on the ground that they violate the Foreign Service Act or some other body of law.[6/] To resolve whether the Board had jurisdiction to set aside USIA's security determination with respect to defendant and to order defendant's reinstatement as a limited

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[4/]See *Memorandum in Support of Plaintiff's Motion for Summary Judgment and for Dismissal of Defendant's Counterclaim* at 4, 15-21.

[5/]*See Memorandum of Defendant and Counterclaimant Jan Krc in Opposition to Plaintiff's Motion for Summary Judgment and to Dismiss the Counterclaim* at 5-8; *Memorandum in Support of Motion of Defendant and Counterclaimant Jan Krc to Dismiss the Complaint and for Summary Judgment on Count I of the Counterclaim* at 17-23.

[6/]The Court is aware of only one case that expressly addresses this question. Judge Flannery of this Court held that non-tenured members of the Foreign Service cannot file grievances with the Board challenging the reasons underlying their separation from the Service because allowing such grievances would permit non-tenured members of the Service "to obtain indirectly that which is denied them by Section 1101(b)(3), namely, Board review of their separations." *Haynes v. Shultz*, C.A. No. 83-2404 (D.D.C. Sept. 1, 1983).

appointee in the Foreign Service, the Court need not resolve this difficult and complicated question. Instead, plaintiffs' challenge to the Board's authority can be resolved on the basis of the Supreme Court's recent decision in *Department of Navy v. Egan.*[2/]

In *Egan*, the Supreme Court held that the Merit Systems Protection Board ("MSPB") did not have authority to examine the substance of a decision by the Department of Navy to revoke a security clearance in the course of its review of an adverse action. The Court asserted that the general presumption in favor of appellate review of administrative determinations "runs aground when it encounters concerns of national security." *Egan*, 108 S. Ct. at 823. The Court further explained that:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons ... too obvious to call for enlarged discussion," *CIA v. Sims*, 471 U.S. 159, '70 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court has accordingly acknowledged that with respect to employees in sensitive positions "*there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose trust in an employee who has access to such information.*"

[2/]108 S. Ct. 818 (1988).

Id. at 825 (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956) (emphasis added).[8/]

Although the precise issue in *Egan* was whether the MSPB, in the course of its review of an adverse action, had the authority to review the substance of an agency's decision to deny or revoke a security clearance, the language of the Court's opinion in *Egan* is very sweeping, and suggests that nonexpert bodies are not authorized to review the security clearance determinations made by any agency.[9/] As such, the only way the Court can find that the Foreign Service Grievance Board had authority to review USIA's withdrawal of defendant's security clearance approval for overseas service is to find some relevant difference between the statutory language governing and establishing the Merit Systems Protection Board and the statutory language governing and establishing the Foreign Service Grievance Board.[10/]

[8/]The Court also relied on the language of the Civil Service Reform Act to fortify its conclusion. In particular, the Court pointed to that fact that the language of the Act "does not confer broad authority on the Board to review a security-clearance determination." *Egan*, 108 S. Ct. at 825. In addition, the Court noted that the Board's evaluation of adverse actions by a preponderance of the evidence standard was inconsistent with the "clearly consistent with the interests of national security" test that should be applied when making security clearance determinations. *Id.* at 826.

[9/]Defendant takes issue with the application of *Egan* to the facts of this case because his security clearance was not revoked. Instead, he was denied security approval for an overseas post with the Foreign Service because USIA's Security Officer concluded, based on defendant's past conduct in Belgrade, that service overseas by defendant was not in the best interests of the national security. The fact that the Security Officer denied defendant security approval for overseas service instead of revoking his security clearance is a distinction without a difference. Many of the considerations that play a role in an agency decision to revoke a security clearance must have been relevant to the Security Officer's decision to deny defendant security approval for overseas service.

[10/]The Court directed the parties to brief this precise issue by Order dated August 30, 1988.

Defendant has suggested numerous ways in which the statutory framework of the MSPB and the FSGB differ.[11/] None of defendant's suggestions, however, provide justification for the conclusion that Congress, specifically, intended the Grievance Board to have authority to review the merits of security clearance determinations. First, defendant maintains that the Foreign Service Act is broad enough to allow, and does not prohibit, the Grievance Board's consideration of a grievance challenging withdrawal of a security clearance.[12/] Although true, the Supreme Court, in *Egan*, rejected the notion that the absence of a provision precluding review of the denial of a security clearance created a presumption in favor of review. Egan, 108 S. Ct. at 823.

In support of the Grievance Board's authorization to review security clearance determinations, defendant also points to the fact that the MSPB's jurisdiction is expressly limited by 5 U.S.C. § 7532(a) which vests civil service agencies with "final" authority to suspend and remove employees "in the interests of the national security."[13/] Based on the absence of such a provision in the Foreign Service Act, defendant concludes that the Grievance Board is authorized to hear a grievance concerning a security clearance determination. Reliance on the absence of a similar limitation on the Grievance Board's jurisdiction is problematic because the Supreme Court in *Egan* made clear that the absence of a provision precluding review of a denial of a security clearance does not create a presumption in favor of review. *Egan*, 108 S. Ct. at 823.

Defendant also maintains that the legislative history of the Foreign Service Act supports the availability of review of a security clearance determination by the Grievance Board.

[11/] *See Supplemental Memorandum of Defendant and Counterclaimant Jan Krc.*

[12/] *Id.* at 3.

[13/] Id. at 3-4.

Specifically, defendant notes that, unlike the MSPB's predecessor, the Grievance Board was established at a time when security clearance determinations were reviewable by the courts, and the Board was directed to "insure the fullest measure of due process for the members of the Foreign Service."[14/] Reliance on the availability of judicial review of security clearance determinations at the time of the Foreign Service Act's enactment may have carried some weight prior to the Supreme Court's decision in *Egan*; such reliance is now, however, misplaced.

Moreover, defendant asserts that the differences in the composition of the FSGB and the MSPB suggest that the Grievance Board has greater authority over the revocation of security clearances than does the Merit Systems Protection Board.[15/] In particular, defendant argues that, unlike MSPB members who are appointed by the President with the advice and consent of the Senate, members of the FSGB are security-cleared individuals who are appointed by the Secretary of State.[16/] In addition, defendant contends that the Grievance Board's expertise in interpreting the rules and regulations applicable to the Foreign Service community suggests that it has authority to review security clearance

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[14/] *Id.* at 4.

[15/] Id. at 4-5.

[16/] Several provisions of the Foreign Service Act show that the security-cleared status of members of the Foreign Service Grievance Board does not bestow upon them the expertise necessary to review an agency's determination that the granting of a security clearance to a particular individual would pose a threat to the national security. The Board's access to documents relevant to grievances brought before it is not unlimited; an agency head may withhold from the Board a record or document when its disclosure "would adversely affect the ... national security of the United States." 22 U.S.C. § 4138(b) (1) (B) (2) (Supp. 1988). Moreover, an agency must follow the recommendations of the Board "except to extent that ... the recommendation ... would adversely affect the foreign policy or national security of the United States." Id. § 4137(d)(1).

determinations.[17/] Neither the security-cleared status of members of the Foreign Service Grievance Board nor their expertise in interpreting rules and regulations pertaining to the Foreign Service community has any bearing on the expertise of these individuals in predicting whether entrusting a particular individual with classified information, in a particular setting, could pose a threat to the national security.

Because the composition of the Foreign Service Grievance Board -- in terms of legislative history, duties, composition, and expertise -- does not differ from the Merit Systems Protection Board in any way that suggests that the Foreign Service Grievance Board has greater authority to review security clearance determinations, the Court concludes that the Supreme Court's holding in *Egan* applies to the Foreign Service Grievance Board just as it does to the Merit Systems Protection Board. Accordingly, the Court will grant plaintiff's motion for summary judgment because the Foreign Service Grievance Board did not have the authority to review USIA's revocation of defendant's security approval for overseas service and to order his reinstatement as a limited appointee in the Foreign Service, and will deny defendant's motion to dismiss the complaint.

[17/] *Id.* at 5.

In support of their statement that the Foreign Service Grievance Board has expertise in interpreting the rules and regulations applicable to the Foreign Service community, defendant cites to *United States v. Paddack*, 825 F.2d 504 (D.C. Cir. 1987). The issue before the Court of Appeals in *Paddack* was whether the Board acted arbitrarily and capriciously in holding that the regulations governing the travel of Foreign Service officers permitted an officer to travel with his family on a luxury riverboat. The Court of Appeals held that appropriate deference must be paid to the Board's interpretation of the travel regulations because the Board had greater expertise in interpreting these regulations than did the Court. The Court cannot discern how the holding of the Court of Appeals in *Paddack* has any bearing on whether the Foreign Service Grievance Board has the requisite expertise for reviewing security clearance determinations.

THE COURT WILL DENY PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM AS IT PERTAINS TO THOSE COUNTS ALLEGING THAT PLAINTIFF'S TERMINATION OF DEFENDANT DEPRIVED DEFENDANT OF LIBERTY WITHOUT DUE PROCESS OF LAW, BUT THE COURT CANNOT DECIDE THESE COUNTS UNTIL IT RECEIVES ADDITIONAL INFORMATION.

Even though the Court lacks jurisdiction to review the merits of USIA's decision to deny defendant security approval for an overseas post with the Foreign Service, the Court does have jurisdiction to review any colorable constitutional claims that defendant may have arising out of USIA's denying him security approval. This is because the language of the Foreign Service Act does not expressly preclude such review. *See, e.g., Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988)(explaining that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear").

Defendant maintains that the methods by which USIA denied him security approval for overseas service denied him liberty and property without due process of law and, therefore, violated his fifth amendment rights. Plaintiff argues that defendant's constitutional claims are not colorable and should, therefore, be dismissed. In particular, plaintiff asserts that defendant had no property interest in his limited appointment to the Foreign Service because the Foreign Service Act provided that his appointment could be terminated "at any time."[18/] In addition, plaintiff maintains that defendant's liberty interests could not have been infringed upon because defendant has failed to allege that plaintiff has publicly disclosed false information about him and that the disclosure has stigmatized him so as to impair his future

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[18/] *See Plaintiff's Memorandum of Points and Authorities In Support of Motion for Summary Judgment and In Support of Motion to Dismiss Defendant's Counterclaim* at 27.

employment opportunities.[19/] The Court does not entirely agree with plaintiff's evaluation of defendant's constitutional claims.

1. Defendant Does Not Have a Property Interest in His Limited Appointment to the Foreign Service.

Plaintiff's property interest claim raises the question of whether a limited appointee, terminated from a position in the Foreign Service because of the revocation of his security approval for overseas service, has a property interest in his or her job. After *Egan*, the law is clear that "no one has a 'right' to a security clearance. The grant of a security clearance requires an affirmative act of discretion on the part of the granting official." *Egan*, 108 S. Ct. at 824. The termination of defendant's limited appointment from the Foreign Service rested solely on plaintiff's denial of defendant's security approval for overseas service. Because defendant's security clearance for overseas service was a *sine aua non* of his position with the Foreign Service, it is not possible to distinguish between plaintiff's interest in a security clearance and any entitlement that he had to continued employment with the Foreign Service. Accordingly, the Court will dismiss defendant's counterclaim alleging that his termination from the Foreign Service violated his Fifth Amendment rights by denying him property without due process of law.[20/]

[19/] *Id.* at 29.

[20/] It should be noted that the Court's holding is not intended to foreclose a limited appointee to the Foreign Service from asserting a cognizable property interest in instances where his or her termination is unrelated to national security concerns.

2. Plaintiff's Termination of Defendant's Limited Appointment Had the Effect of Triggering Defendant's Liberty Interest in Reputation.

A government employee's liberty interests are implicated when the government's actions "might seriously damage [the individual's] standing in his [or her] community" or when the government's "declining to re-employ the [individual], imposed on him [or her] a stigma or other disability that foreclosed his [or her] freedom to take advantage of other employment opportunities." *Board of Regents v. Roth*, 408 U.S. at 573-74. Damage to reputation alone does not provide an adequate basis for a colorable liberty interest claim. Instead, a government employee must make a two-part showing:

> First, the government must have altered the "status" of the employee, foreclosing the employee's future employment opportunities, or reducing the employee's rank or pay. Second, this change in "status" must be accompanied by injury to the employee's good name, reputation, honor or integrity, or by the imposition of a similar stigma.

Doe v. Casey, 796 F.2d 1508, 1523 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds*, *Webster v. Doe*, 108 S. Ct. 2047 (1988).

Plaintiff cannot seriously question that defendant's status changed as a result of its denying defendant security clearance approval for overseas service. Without security clearance approval for serving overseas, defendant has been foreclosed from filling any Foreign Service post overseas. *See*, *e.g.*, *Doe v. United States*, 753 F.2d 1092, 1106-08 (D.C. Cir. 1985) (stating that loss of government employment or the foreclosure of future employment opportunities amounts to a change in status).

The Court also finds that defendant has demonstrated that he was stigmatized as a result of plaintiff's denying him security clearance approval for service overseas. The government did not deny defendant security clearance approval for overseas service because of his homosexuality,

but because of the particular homosexual conduct that he engaged in while in Belgrade. Since USIA "terminated [defendant as a limited appointee with the Foreign Service] because *his* homosexuality presented a unique security risk not necessarily presented by all other homosexuals, [the Court] must conclude that [defendant's termination] is sufficiently stigmatizing to give rise to a colorable liberty interest claim." *Doe v. Casey*, 796 F.2d at 1523.

3. The Court Needs Additional Information to Determine Whether Defendant Received the Process to Which He Was Entitled.

The discussion, in both parties' briefs, concerning defendant's liberty interest claim focuses on whether the termination of defendant's limited appointment with the Foreign Service had the effect of triggering a colorable liberty interest claim. The parties' briefs did not discuss, in any depth, whether defendant received the informal name-clearing hearing to which he was entitled.[21/] Accordingly, the Court will direct the parties to submit affidavits or other documentary evidence on what process the defendant received accompanied, if appropriate, by dispositive motions.

The Court will issue an order of even date herewith memorializing these findings.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

DATE: April 19, 1989

[21/] *See Doe v. Casey*, 796 F.2d 1508, 1524 (D.C. Cir. 1986) (quoting *Endicott v. Huddleston*, 644 F.2d 1208, 1216 (7th Cir. 1980)) (explaining that "[i]n its essence, a hearing demands that the person have the right to support his allegations by argument, however brief, and if necessary, by proof, however informal").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Information Agency,	:	**FILED APR 20, 1989**
Plaintiff,	:	
v.	:	CIVIL ACTION
	:	NO. 87-1740
Jan Krc,	:	
Defendant	:	

ORDER

In accordance with the Court's Opinion of even date herewith, it is, by the Court, this 19th day of April, 1989,

ORDERED that plaintiff's motion for summary judgment, in its favor, shall be, and hereby is, granted because the Foreign Service Grievance Board lacked jurisdiction to review the merits of plaintiff's security clearance determination and to order defendant's reinstatement; and it is

FURTHER ORDERED that plaintiff's motion to dismiss defendant's counterclaim shall be, and hereby is, granted with respect to Count I of the counterclaim, requesting enforcement of the decision of the Foreign Service Grievance Board, and Count IV of the counterclaim, alleging that plaintiff's termination of defendant deprived defendant of property without due process of law in violation of the Fifth Amendment; and it is

FURTHER ORDERED that plaintiff's motion to dismiss defendant's counterclaim shall be, and hereby is, denied, without prejudice, with respect to Counts II and III of the counterclaim, alleging that plaintiff's termination of defendant deprived defendant of liberty without due process of law in violation of the Fifth Amendment; and it is

FURTHER ORDERED that defendant's motion to dismiss the complaint shall be, and hereby is, denied; and it is

FURTHER ORDERED that defendant's motion for summary judgment, in his favor, on Count I of the counterclaim, seeking enforcement of the decision and order of the Foreign Service Grievance Board, shall be, and hereby is, denied; and it is

FURTHER ORDERED that the parties shall file on or before 4:00 p.m. on May 5, 1989 affidavits or other documentary evidence concerning what process defendant received accompanied, if appropriate, by dispositive motions; and it is

FURTHER ORDERED that the parties shall file any oppositions to any dispositive motions filed or replies thereto within the time periods set forth in the Local Rules of this Court.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Information Agency,	:	**FILED MAY 31 1989**
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 87-1740
Jan Krc,	:	
	:	
Defendant.	:	

ORDER

On April 20, 1989, the Court issued an Opinion and Order granting plaintiff its motion for summary judgment because the Court concluded that the Foreign Service Grievance Board lacked jurisdiction to review the merits of plaintiff's decision to withdraw defendant's security approval for overseas service and to order defendant's reinstatement as a limited appointee in the Foreign Service. In addition, the Court granted plaintiff's motion to dismiss defendant's counterclaim as it pertained to Counts I and IV. The Court denied plaintiff's motion to dismiss defendant's counterclaim, however, with respect to Counts II and III. These counts allege that plaintiff's termination of defendant from the Foreign Service deprived defendant of liberty without due process of law in violation of the Fifth Amendment.

On May 4, 1989, plaintiff filed a motion requesting the Court to reconsider its decision to deny plaintiff's motion to dismiss Counts II and III of defendant's counterclaim on the ground that defendant has failed to assert a colorable liberty interest claim. Upon consideration of plaintiff's motion, the supporting and opposing legal memoranda, and the underlying law, the Court will grant plaintiff's motion to reconsider, and

will enter an Order dismissing Counts II and III of defendant's counterclaim for failure to state a cognizable liberty interest claim.

A government employee's liberty interests are implicated when the government's actions "might seriously damage [the individual's] standing in his [or her] community" or when the government's "declining to re-employ the [individual], imposed on him [or her] a stigma or other disability that foreclosed his [or her] freedom to take advantage of other employment opportunities." *Board of Regents v. Roth*, 408 U.S. 564, 573-74. Damage to reputation alone does not provide an adequate basis for a liberty interest claim. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976). Instead, a government employee must make a two-part showing:

> First, the government must have altered the "status" of the employee, foreclosing the employee's future employment opportunities, or reducing the employee's rank or pay. Second, this change in "status" must be accompanied by injury to the employee's good name, reputation, honor, or integrity, or by the imposition of a similar stigma.

Doe v. Casey, 796 F.2d 1508, 1523 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds*, *Webster v. Doe*, 108 S. Ct. 2047 (1988).

The law in this Circuit provides that any alteration in a government employee's status does not give rise to a colorable liberty interest claim. The change in status must "involve a removal, extinguishment, or significant alteration of an interest recognized and protected by state [or federal] law." *Mosrie v. Barry*, 718 F.2d 1151, 1160-61 (D.C. Cir. 1983) (citing *Paul v. Davis*, 424 U.S. at 710-11). This means that "[f]or a defamation to give rise to procedural due process, it is necessary ... that the defamation be accompanied by a discharge from government employment or at least a demotion in rank and pay." *Mosrie*, 718 F.2d at 1161. Moreover, a lateral transfer from one government position to another does not constitute a loss of government employment for procedural due process purposes, even if

such transfer is accompanied by a loss of promotion potential and responsibilities. *Id.*

Here, defendant was converted from a Foreign Service appointment to a Civil Service appointment with the plaintiff agency. When plaintiff converted defendant, it provided him with credit for the time he served in the Foreign Service and increased his rate of pay.[1/] In addition, plaintiff "retained his security clearance and title as an international visitor exchange specialist [and,] [t]herefore [retained his] access to classified information in general, but not to information found at overseas posts in the Foreign Service."[2/]

Defendant argues that the limitation in the scope of his security clearance constitutes a sufficient change in status to give rise to a colorable liberty interest claim because he claims he is now precluded from filling a position in the Foreign Service and "has been effectively foreclosed from obtaining any future employment that would require a security clearance."[3/] Defendant's argument is without merit. The fact that defendant is precluded from serving in the Foreign Service does not constitute a change in status significant enough to entitle him to procedural due process, because he did not suffer a loss of government employment or a demotion in rank or pay. *Mosrie*, 718 F.2d at 1161. Moreover, whether defendant may be foreclosed from obtaining future employment requiring a security clearance is immaterial because a liberty interest is not implicated when a government employee loses some employment opportunities, *Id.* at 1162, or the employee's "attractiveness to potential employers" is reduced. *Perry v. Federal Bureau of*

[1/] *See Declaration of Harlan F. Rosacker* (attached to Plaintiff's Motion for Reconsideration).

[2/] *Plaintiff's Motion for Reconsideration of the Order and Opinion of April 20, 1989* at 7-8.

[3/] *Memorandum of Jan Krc in Opposition to Plaintiff's Motion for Reconsideration of the Order and Opinion of April 20, 1989* at 11.

Investigation, 781 F.2d 1294, 1302 (7th Cir.), *cert. denied*, 479 U.S. 814 (1986).

In his opposition to plaintiff's motion to reconsider, defendant suggests that the Court should also reconsider the portion of its decision granting plaintiff's motion for summary judgment on the ground that the Foreign Service Grievance Board lacked jurisdiction to review the merits of plaintiff's security determination with respect to defendant and to order plaintiff to reinstate defendant in a security-cleared position in the Foreign Service. The Court cannot accept defendant's invitation to reconsider that portion of the Court's decision because defendant's request is untimely. Any motion to alter or amend a judgment must "be served not later than 10 days after the entry of judgment," Fed. R. Civ. P. 59(e), and it is not within the Court's power to extend the ten day time limitation for filing such a motion. Fed. R. Civ. P. 6(e).

Finally, all outstanding motions in this case are now moot by virtue of the Court's granting of plaintiff's motion to reconsider, with the exception of defendant's unopposed request that the Court's Opinion and Order of April 20, 1989 be unsealed.

Accordingly, it is, by the Court, this 31st day of May, 1989,

ORDERED that plaintiff's motion for reconsideration of the Court's order and Opinion of April 20, 1989 shall be, and hereby is, granted; and it is

FURTHER ORDERED that Counts II and III of defendant's counterclaim shall be, and hereby are, dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted; and it is

FURTHER ORDERED that the Court's Opinion and Order of April 20, 1989 shall be, and hereby are, unsealed; and it is

FURTHER ORDERED that all outstanding motions in this case shall be, and hereby are, dismissed as moot; and it is

FURTHER ORDERED that the above-captioned case stands dismissed from the dockets of this Court.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Information Agency,	:	**FILED JUL 21 1989**
Plaintiff,	:	
v.	:	CIVIL ACTION
	:	NO. 87-1740
Jan Krc,	:	
Defendant.	:	

ORDER

According to the docket entries in the above-captioned case, defendant and counterclaimant, Jan Krc, filed a motion for leave to amend his counterclaim on June 2, 1989. The Court lacks jurisdiction to decide this motion because the Court issued an Order on May 31, 1989 dismissing the case from the dockets of the Court.

Accordingly, it is, by the Court, this 21st day of July, 1989,

ORDERED that the Clerk of the Court shall return to defendant and counterclaimant, Jan Krc, his motion to amend his counterclaim.

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Jan Krc, Grievant	Record of Proceedings No. G-85-012-USIA-1
and	Date: August 13, 1985
The U.S. Information Agency	DECISION ON RESPONDENT'S MOTION TO DISMISS

I. GRIEVANCE

Effective February 28, 1985 the United States Information Agency (USIA or the agency) terminated the limited appointment of Jan Krc, a Foreign Service Information officer of Class 4. Such action was taken pursuant to the authority contained in Section 611 of the Foreign Service Act of 1980 (the Act). Krc grieved that termination alleging that it was contrary to law. He claims that he was actually terminated for misconduct, which requires a hearing before this Board prior to separation to establish the cause for separation pursuant to Section 610(a)(2) of the Act. He also maintains that his separation violated Section 105 of the Act because it was not in accordance with merit principles.

The agency filed a motion to dismiss this grievance for lack of jurisdiction, asserting that Section 611 terminations of limited appointments are not grievable. That motion is before us for decision.

II. BACKGROUND

Krc entered on duty in the Foreign Service under a limited appointment on September 19, 1982 as a Junior Officer Trainee, FS-05. He was transferred to Belgrade, Yugoslavia on August 21, 1983 and was promoted to FS-04 on April 1,

1984. He was scheduled for transfer to Capetown, South Africa on or about August 30, 1984.

On August 21, 1984, before going to Capetown, Krc was interviewed by the Office of Security. He acknowledged, in response to questioning, that he was homosexual and that during his term of service he had engaged in homosexual conduct with various individuals in Yugoslavia and elsewhere. Thereafter he was notified that his transfer to Capetown had been canceled. On September 6, Krc requested a written explanation from the Director of Personnel. On September 10, grievant received a letter from Angie Garcia, Director of Personnel, stating that he did not have security approval to serve in Capetown and that the Personnel staff was exploring the possibility of another assignment.

On October 3, 1984 Garcia notified Krc in writing that she proposed to terminate his limited appointment "under Sections 610 and 611" of the Act based on alleged misconduct that was said to demonstrate: "insubordination, irresponsibility, poor judgment and lack of discretion." The allegation of misconduct was based on Krc's homosexual and related conduct as contained in the statement he made to the Office of Security. The specific charge of insubordination evidently was based on Krc's alleged violation of agency instructions prohibiting engaging in sexual relations with Communist country nationals. The letter informed Krc of his right to a pretermination hearing before the Foreign Service Grievance Board.

Krc made an oral presentation to Garcia and submitted several statements from colleagues in his defense. Thereafter, on December 11, 1984, Garcia issued the following decision:

> This letter constitutes my decision regarding your proposed termination under Sections 610 and 611 of the Foreign Service Act of 1980.
>
> I have undertaken considerable research and have given careful consideration to the oral presentation made by you and your representatives as well as to the written materials submitted in your behalf. Accordingly I do not

> find that the evidence would support the termination of your appointment, as I had proposed. However, based on the poor judgment and indiscretion demonstrated by your actions, I am issuing an official letter of reprimand.
>
> This letter will be made part of your Administrative Personnel Folder where it will remain for up to two years, and will be considered should there be future incidents involving you for which disciplinary action may be appropriate.

Evidently, the charge of insubordination was dropped at least in part because of showing by Krc that the non-fraternization policy cited by the agency did not apply in Yugoslavia.

On January 11, 1985, Bernard Dowling, Director of Security, notified Garcia that he would not approve any Foreign Service assignment for Krc because Krc had engaged in homosexual activity while in Yugoslavia and had been open about his homosexuality with a number of Yugoslav nationals, including "those who would obviously be relied upon as informants by hostile intelligence services." On January 25, 1985 Garcia notified Krc in writing that she was terminating his limited appointment, under section 611 of the Act, because the Office of Security's determination that he could not be given an overseas assignment meant that there was no need for his services in the Foreign Service. She asserted that the termination was not "a disciplinary or performance-based action," and that he was not disqualified from competing for a domestic assignment in USIA or any other agency. She also indicated that, effective upon his final separation from the Foreign Service, the letter of reprimand dated December 11, 1984 would be vacated.

Grievant had been transferred on October 1, 1984 to the Bureau of Education and Cultural Affairs, Office of International Visitors, Europe Branch. On March 3, 1985, his status was converted to a limited appointment in the Civil Service, GS-130-11, effective until March 3, 1986. His grade and salary are approximately equivalent to those he held in the Foreign Service. Evidently, the Office of

Personnel Management has subsequently approved a career Civil Service appointment for Krc, as requested by the agency.

III. POSITIONS OF THE PARTIES ON THE MOTION TO DISMISS

Agency

The agency makes three arguments supporting its motion to dismiss for lack of jurisdiction:

A. The termination of Krc's limited appointment in the Foreign Service is not subject to a hearing before this Board under the terms of the Act.

B. The termination of this limited appointment violated no applicable statute or regulations.

C. Krc is not entitled to a hearing on constitutional grounds because he had neither property nor liberty rights in his employment nor constitutional protection with respect to the actions that formed the basis for the termination.

Grievant

In response, Krc urges that:

A. He is entitled to a hearing before this Board pursuant to Section 610(a)(2) of the Act because he was terminated for misconduct.

B. He has an independent right to a hearing under Section 1101(a)(1) of the Act because, contrary to Section 105 of the Act, his termination was not in accordance with merit principles.

C. He would be entitled to a hearing under the due process clause of the U.S. Constitution even if he did not have a statutory right under the cited provisions of the Act.

Rather than restating each party's legal arguments at length, which are well articulated in the briefs submitted to us, we will note them as they become relevant to the discussion of the issues.

IV. FINDINGS AND CONCLUSIONS

Bearing in mind that we are not called upon to decide the merits of grievant's claim in ruling on this motion, but only to determine whether we have jurisdiction to do so, the basic issue is whether he has stated a claim which is cognizable by us under the Act.

This Board has jurisdiction to consider any grievance not resolved under agency procedures that is within the scope of the definition of the term grievance contained in Section 1101 of the Act, which provides in relevant part:

SEC. 1101. DEFINITION OF GRIEVANCE.

(a)(1) Except as provided in subsection (b), for purposes of this chapter, *the term "grievance" means any act*, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service who is a citizen of the United States of a right or benefit authorized by law or which is otherwise a source of concern or dissatisfaction to the member, *including* -- (A) *separation of the member allegedly contrary to laws or regulations*, or predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member;

(b) For purposes of this chapter, the term "*grievance*" does not include -- (3) ... *the termination of a limited appointment under section 611* ... (Emphasis added.)

Section 611 of the Act provides:

Sec. 611. TERMINATION OF LIMITED APPOINTMENTS.

Except as provided in section 610(a)(2), the Secretary may terminate at any time the appointment of any member of the Service serving under a limited appointment who is in the Senior Foreign Service, who is assigned to a salary class in the Foreign Service Schedule, or who is a family member of a Government employee serving under a local compensation plan established under section 408. (Emphasis added.)

Section 610(a) of the Act provides:

> SEC. 610. SEPARATION FOR CAUSE.
>
> (a)(1) The Secretary may separate any member from the Service for such cause as will promote the efficiency of the Service.
>
> (2) *A member of the Service* who is a member of the Senior Foreign Service or is assigned to a salary class in the Foreign Service Schedule and who either (A) is serving under a career appointment, or (B) *if separation is to be by reason of misconduct, is serving under a limited appointment, shall not be separated from the Service under this section until the member has been granted a hearing before the Foreign Service Grievance Board and the cause for separation established at such hearing, unless the member waives in writing the right to a hearing*. The hearing provided under this paragraph shall be in accordance with the hearing procedures applicable to grievances under section 1106 and shall be in lieu of any other administrative procedure authorized or required by this or any other law. (Emphasis added.)

Grievant argues that his termination was in fact by reason of misconduct and that he should only have been terminated after a hearing before this Board, pursuant to Section 610(a)(2), as was originally proposed by the agency.

The agency argues that, while the original grounds for his termination were in fact misconduct and he was told at that time that he was entitled to a Section 610 hearing, that proposed termination was subsequently withdrawn, as was a letter of reprimand initially substituted therefore, and a termination under Section 611 was effected. Thus, argues the agency, the allegation of misconduct has now disappeared from the case so these is no basis for a Section 610 hearing.

Grievant claims, however, that the essence of the original charges against him remains the same. He insists that the allegation of misconduct under cited sections of the Foreign Affairs Manual (FAM) have changed only in form, but not in substance. He notes that his termination letter under Section 611 made reference to and attached a memorandum from the

Director of Security which repeated in essence the same charges that had been made against him originally. He states that those charges were then used, and continue to be used, to justify the withdrawal of his security clearance, the ostensible reason for his termination under Section 611.

He also disputes the agency's claim that there is no disagreement as to the facts relevant to its determination to terminate him.

Grievant also urges that his termination was contrary to Section 105 of the Act because it was not made in accordance with merit principles. Section 105(a) provides:

> SEC. 105. MERIT PRINCIPLES; PROTECTIONS FOR MEMBERS OF THE SERVICE; AND MINORITY RECRUITMENT.
>
> (a)(1) *All personnel actions with respect to* career members and *career candidates in the Service* (including applicants for career candidate appointments) *shall be made in accordance with merit principles.*
>
> (2) *For purposes of paragraph (1), the term "personnel action" means* -- (A) any appointment, promotion, assignment (including assignment to any position or salary class), award of performance pay or special differential, within-class salary increase, *separation*, or performance evaluation, and (B) any decision, recommendation, examination, or ranking provided for under this Act which relates to any action referred to in subparagraph (A). (Emphasis added)

Section 102(8) of the Act defines "merit principles" as meaning the principles set out in Section 2301(b) of Title 5 of the United States Code. Grievant alleges that his termination was contrary to the specific principles set forth in Subsections (2) and (6) of Section 2301(b). Section 105(b)(4) of the Act also requires that the Act be administered so as to insure that members of the Service are free from any personnel practice prohibited by Section 2302 of Title 5 of the United States Code. Grievant alleges that his separation was contrary to Subsection (10) of Section 2302(b) which prohibits discrimination:

on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.

The agency asserts that grievant's termination violated no applicable statute or regulation. It insists that its determination that his conduct during non-working hours demonstrated poor judgment and indiscretion was highly relevant to his performance as a Foreign Service employee. The agency maintains, therefore, that it properly terminated his limited appointment under Section 611 of the Act.

We conclude that Krc's grievance states a claim within the Board's jurisdiction. Grievant has alleged in his grievance sufficient facts to raise in our minds substantial questions concerning the legality of his termination under Section 611 of the Act.

If we find that the original charges of misconduct are actually the reasons for his subsequent termination, that termination would be contrary to law because there was no hearing as required by Section 610(a)(2) of the Act. Grievant in that case would be entitled to reinstatement in the Service. For purposes of ruling on the present motion to dismiss this grievance for lack of jurisdiction we cannot accept as conclusive, on the record before us, the agency's assertion that Krc's termination was not predicated on misconduct.

In addition, the separation of a career candidate serving under a limited appointment is included among the personnel actions that are subject to the requirements of Section 105 of the Act, and a termination pursuant to Section 611 that was in violation of Section 105 would be invalid. Again, at this stage of this proceeding, the agency's denial of any violation of Section 105 cannot be accepted as conclusive.

As noted above, Section 1101(l)(b)(3) provides that the termination of a limited appointment under Section 611 is not included in the term "grievance." In our view this section was not intended to insulate the agency from grievances alleging that an action ostensibly taken pursuant to Section 611 was actually in violation of law. Such grievances could arise because the agency properly should have acted under

Section 610(a)(2), a stated exception to Section 611, or because such action did not conform to the requirements of Section 105. To hold otherwise would be to effectively nullify clear rights afforded to limited appointees.

The agency, we note, does not appear so much to argue that we lack jurisdiction to review a termination of a limited appointment that violates the Act as to deny that any such violation occurred. This is a matter which, of course, remains to be determined. We conclude at this stage of the proceeding only that grievant has presented a claim that is within the scope of our jurisdiction and is entitled to a decision on the merits of that claim.

In light of our decision that we have statutory authority to hear grievant's claim that his termination was contrary to the provisions of the Act, it is unnecessary for us to reach the constitutional issues that have been raised in the parties' arguments.

Grievant has requested a hearing under Section 905 of the Board's regulations. It is our judgment that such a hearing is necessary to determine whether his termination under Section 611 of the Act was contrary to law or regulation.

V. DECISION

The Agency's motion to dismiss for lack of jurisdiction is denied. The matter shall be calendared for a hearing by the Board under Section 905 of the Board's regulations.

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Jan Krc,
Grievant

Record of Proceedings
No. G-85-012-USIA-1

and

Date: March 19, 1987

The U.S. Information Agency

I. GRIEVANCE

Effective February 28, 1985 the United States Information Agency (USIA or the agency) terminated the limited appointment of Jan Krc, a career candidate Foreign Service Information Officer, Class 4, pursuant to the authority in section 611 of the Foreign Service Act of 1980 (the Act). Krc grieved that termination, alleging that he was actually terminated for misconduct, an action which requires an initial hearing before this Board to establish the cause for separation pursuant to section 610(a)(2) of the Act. He also maintained that his separation was grievable under section 1101(a)(1) of the Act because it was not in accord with merit principles, as required by section 105.

The agency's motion to dismiss Krc's grievance for lack of jurisdiction was denied by the Board on August 13, 1985. A prehearing conference was held on October 28, 1985. A hearing was held on February 3 and 4, 1986, after which the parties submitted post-hearing briefs. The Board also received *amicus curiae* briefs from the Department of State, the Agency for International Development and the Office of Personnel Management.

II. BACKGROUND

Krc entered on duty in the Foreign Service under a limited appointment on September 19, 1982 as a Junior Officer

Trainee, FS-05. He was transferred to Belgrade, Yugoslavia on August 21, 1983 and was promoted to FS-04 on April 1, 1984. He was scheduled for transfer to Capetown, South Africa on or about August 30, 1984.

On August 21, 1984, before going to Capetown, Krc was debriefed by the Office of Security. Krc freely acknowledged, when the security officer raised the subject during his debriefing, that he was homosexual. He then provided details concerning his sexual conduct during his employment with the agency, and signed a written statement relating thereto. This evidently was the first occasion since he had applied to join the Foreign Service that he was questioned regarding his sexual preference or conduct.

On August 30, 1984, Krc was notified that his transfer to Capetown had been cancelled. In response to Krc's request for a written explanation, the Director of Personnel, Angie Garcia, informed him by letter that he did not have security approval to serve in South Africa and that Personnel was exploring the possibility of another assignment.

On October 3, 1984, Garcia wrote Krc that she proposed to terminate his limited appointment "under Sections 610 and 611" of the Act based on alleged misconduct that was said to demonstrate "insubordination, irresponsibility, poor judgment and lack of discretion." The allegation of misconduct was based on Krc's homosexual and related conduct while in Yugoslavia as described in the statement he made to the Office of Security. The specific charge of insubordination was based on Krc's alleged violation of agency instructions prohibiting sexual relations with Communist country nationals. The letter informed Krc of his right to a pretermination hearing before the Foreign Service Grievance Board.

Krc made a presentation to Garcia and submitted several statements from colleagues in his defense. Garcia revoked the proposed termination action on December 11, 1984 and issued an official letter of reprimand to remain in his administrative personnel file for up to two years. This

reprimand was based on "the poor judgment and indiscretion demonstrated by your actions."

In a January 11, 1985 unclassified memorandum, Bernard Dowling, Director of Security, notified Garcia that he would not approve any Foreign Service assignment for Krc. Dowling stated:

> I have again reviewed Mr. Krc's security file, particularly his actions at his last overseas post. As you know, he submitted a signed statement to the Office of Security on August 21, 1984 wherein he admitted engaging in homosexual relationships with eight different men, including two citizens of Yugoslavia while he was serving in Belgrade, Yugoslavia. By engaging in such conduct, he not only showed poor judgment and lack of discretion, he also committed acts which we feel make him a security risk in any foreign service assignment. Specifically, he admitted that he had been open about his homosexuality with a number of other Yugoslav nationals with whom he socialized, including those who would obviously be relied upon as informants by hostile intelligence services. Therefore, to allow Mr. Krc to serve in an overseas capacity would be an intolerable security risk since his homosexuality would make him an extremely likely target for hostile intelligence approaches. Also, in some seventy foreign countries homosexual acts are illegal and punishable by law. Therefore, by simply engaging in homosexual activity while overseas would place him in violation of the laws of most foreign countries thus further increasing his vulnerability to hostile approaches. Consequently, I will not approve any foreign service assignment of Mr. Krc because of the strong security risk involved.
>
> This should not preclude him from a domestic assignment where possible hostile intelligence approaches are less bold and can be more carefully monitored and controlled.

On January 25, 1985, Garcia notified Krc that she was terminating his limited appointment pursuant to section 611 of

the Act. She wrote that the Office of Security's determination that he could not be given any overseas assignment, as set forth in Dowling's memorandum, meant that there was no need for his services in the Foreign Service. She asserted that the termination was not a disciplinary or performance-based action and that he was not disqualified from competing for a domestic assignment in USIA or any other agency. She also indicated that, effective upon his final separation from the Foreign Service, the letter of reprimand dated December 11, 1984 would be withdrawn.

Grievant was transferred on October 1, 1984 to the agency's Bureau of Education and Cultural Affairs in Washington. On March 3, 1985, his status was converted to a limited appointment in the Civil Service, GS-11, effective until March 3, 1986. His grade and salary were approximately equivalent to those he held in the Foreign Service. The Office of Personnel Management subsequently approved a career Civil Service appointment for Krc, as requested by the agency. He is still employed by USIA and retains his security clearance for domestic service only.

III. POSITIONS OF THE PARTIES

A. Grievant

Krc maintains that his termination was unlawful on several grounds: It was based on a belief by the agency that he violated a fraternization policy applicable to officers serving in Yugoslavia, which is in effect a charge of misconduct entitling him to a pretermination hearing before this Board under section 610(a)(2) of the Act; it was based in part on a letter of reprimand asserting a violation of the fraternization policy which is contrary to the facts, resulting in a separation predicated upon the falsely prejudicial character of information in his official personnel record, in violation of section 1101 of the Act; and it was based in part on an arbitrary and irrational bias against homosexuality, in violation of the merit principles established by section 105 of the Act.

Krc rejects as legally unsound the argument by the Agency and *amici curiae* that this Board lacks authority to review the merits of security clearance determinations.

B. Agency

The agency contends Krc was not entitled to a hearing under section 610(a)(2) of the Act because he was not terminated on grounds of misconduct, but as the result of a security determination that he could not be cleared for any overseas assignment. It argues that a termination of a limited appointment pursuant to section 611 of the Act is not grievable under Section 1101(b)(3). The agency further argues that allegations of merit principle violations or prohibited personnel practices do not form an independent basis for a grievance, and inasmuch as Krc's termination was not for misconduct, the only basis on which a limited appointee's termination may be heard by the Board, such claims may not be independently considered.

The agency also vigorously maintains that the Board lacks authority to conduct a substantive review of the merits of the agency's security decision denying Krc clearance for assignment abroad. If the Board finds any basis for asserting jurisdiction over Krc's termination based upon a security determination, such review should be limited to determining whether he was afforded the minimal due process he was entitled to receive. In this regard, the agency and *amici curiae* urge the Board to adopt the reasoning of the Merit Systems Protection Board (MSPB) in *Egan v. Department of the Navy*, 28 M.S.P.R. 509 (1985). Subsequent to the filing of post-hearing briefs in this grievance, the agency submitted to the Board for its consideration the decision of the U.S. Court of Appeals for the Federal Circuit which reversed the MSPB's decision, *Egan v. Department of the Navy*, 802 F.2d 1563 (October 1, 1986).

Finally, the agency maintains that even if the Board were to find jurisdiction to review the security determination, the facts do not support a conclusion of any impropriety in that determination.

IV. FINDINGS AND CONCLUSIONS

The actions taken by the agency following grievant's August 21, 1984 debriefing by the Office of Security fall into a clear sequence. The first phase, disciplinary action by the Director of Personnel, began with a proposed termination of grievant's limited appointment based on charges of misconduct, primarily a conscious violation of the agency's fraternization policy with respect to Yugoslav nationals. After an initial response by grievant to these charges, Personnel revoked the proposed termination on December 11, 1984, and substituted a letter of reprimand based on "poor judgment and indiscretion." At that stage, Krc decided not to formally protest the letter of reprimand, which he had been led to believe would not affect his otherwise excellent chances of being awarded a career appointment. The next phase was the decision by the Director of Security that he would not grant Krc clearance for any Foreign Service assignments, expressed in his memorandum of January 11, 1985 to the Director of Personnel. Finally, there was the agency's termination of grievant's limited appointment under the provisions of section 611 of the Act. This action was based solely on the determination of the Office of Security not to clear Krc for an overseas assignment.

Although the initial thrust of this grievance has been that Krc's termination was by reason of misconduct and, hence, he was entitled to a pretermination hearing before this Board under section 610(a)(2) of the Act, the validity of the Office of Security Director's decision to revoke Krc's clearance for overseas assignment has been a key issue throughout the proceedings before the Board, and we address it directly in our resolution of this grievance. If Krc cannot serve overseas, he is effectively disqualified from the Foreign Service. Conversely, if his clearance for overseas service is reinstated, there is no bar to continuation of his Foreign Service career and the sole basis for his termination is removed.

We conclude, for reasons set forth below, that the determination made by the Office of Security is grievable

under section 1101(a)(1) of the Act and that it was arbitrary and capricious and contrary to agency regulations. Grievant's termination, thus, was invalid and must be withdrawn on that basis. Accordingly, we need not, and do not, reach other issues raised by grievant, including his claim that he should have received a pretermination hearing under section 610(a)(2) of the Act.

A. Threshold Issues

Before this Board can address the merits of the Office of Security decision, we must decide two interrelated threshold issues: Is the security decision a grievable matter? If so, does this Board have authority to examine that decision? In deciding those questions, we are guided by the provisions of the Act and applicable case law, particularly the decisions in *Hoska v. United States Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982) and *Egan v. Department of the Navy*, supra. These cases, in our view, are fundamentally at odds with the positions taken by the agency and *amici curiae* with respect to our authority and obligation to review the merits of the security determination that lies at the heart of this grievance.

1. Section 1101(a)(1) of the Act broadly defines a grievance as "any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service ... of a right or benefit authorized by law or regulation or which is otherwise a source of dissatisfaction to the member." We agree with grievant that the quoted language is sufficient to encompass a grievance protesting the legitimacy of a security determination which results in the separation of a member of the Service. Further, a complaint that a security determination contained falsely prejudicial material would qualify as a grievance under section 1101(a)(1)(E). A grievance against an adverse security action notably is not prohibited by section 1101(b) of the Act.

Accordingly, although the termination of a limited appointment under section 611 itself may not be grieved (section 1101(b)(3) of the Act), we find that the underlying

security determination is grievable under section 1101(a)(1) of the Act.

2. We must next consider the extent and nature of the Board's authority to review security determinations such as that in issue. In *Egan*, the court addressed arguments similar to those made by the agency in this case that Executive Order 10450, 3 C.F.R. 936 (1953), gives executive branch agencies final unreviewable authority to make decisions in the interests of the national security. The court found that the Order "does not address appellate review of an agency's grant or denial of security clearance, although it discusses the factors to be weighed to determine whether a person's employment is consistent with the interests of national security." *Egan* at 1570. Rejecting the MSPB's decision, which the agency has urged us to follow here, the court stated (at p. 1573):

> The board, by refusing to review an agency's reasons for refusal of security clearance, denies to those federal employees the minimal opportunity to correct agency error, or to be protected from specious, arbitrary, or discriminatory actions.

The court concluded (at 1575) that "the heavy weight of law and precedent, congressional intent, and fundamental rights," require that agency action premised on denial of a security clearance pursuant to Executive Order No. 10450 receive the same appellate review as other adverse actions taken under 5 U.S.C. § 7512. While the source of our authority to review the security determination at issue in this grievance is the Foreign Service Act, as discussed above, we consider the court's reasoning in *Egan* to be equally applicable here insofar as the court held that security determinations are not immune from the review that is made available by statute (here, chapter 11 of the Foreign Service Act of 1980) for personnel actions generally.

The Board in this case does not seek to substitute its judgment for that of the agency and recognizes the agency's expertise in security matters as well as the heavy responsibility which the agency bears in the safeguard of national security. However, as stated in *Hoska* (at 136-37):

> In those cases where court review is sanctioned, it is well established that an adverse personnel action cannot withstand judicial scrutiny unless there is some rational nexus between the adverse action taken and the government's articulated reasons for the action.
>
> * * *
>
> Courts have been equally vigilant in requiring a nexus between the denial or revocation of an individual's security clearance and the individual's conduct or other evidence relied upon by the government in denying or revoking the clearance.

Accordingly, although the Board will pay due deference to the agency's expertise and responsibilities in security matters, and although the burden of proof will be placed on the grievant (22 C.F.R. § 905.1(a)), if there is no rational nexus between the agency action and the conduct or other evidence relied upon by the agency in revoking a security clearance, this Board has authority to sustain a grievance challenging that action.

B. Agency Security Criteria

The agency's security regulations are set forth in its *Manual of Operations & Administration* (MOA), Part VIII, Chapter 200, Personnel Security Regulations. The policy standard established in section 213.1, *Employment and Retention*, states that:

> Personnel shall be employed and retained in employment within the Agency only when such employment is clearly consistent with the interests of the national security.

National security is defined in section 212.2 as follows:

> The term "national security" relates to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all other illegal acts designed to weaken or destroy the United States.

The critical question here is whether there is a sufficient nexus between the factors relied upon by the agency to revoke grievant's overseas security clearance and the interests of national security. The Office of Security does not claim that Krc is disloyal or untrustworthy, as evidenced by his continued security clearance for domestic service. As set forth in Director of Security Dowling's January 11, 1985 memorandum and his testimony before this Board, the determination to revoke Krc's overseas security clearance was based on Dowling's conclusion that his judgment was questionable and that he was an extremely likely target for and vulnerable to hostile intelligence approaches. This conclusion was based on a composite of the following factors:

(a) Krc knowingly violated the agency's fraternization policy prohibiting sexual intimacy with Yugoslav nationals, about which he was briefed before his departure for Yugoslavia;

(b) Krc showed poor judgment and was indiscreet in his homosexual conduct and openness about his homosexuality;

(c) Krc violated and/or would be likely in the future to violate local law in the conduct of his homosexual relationships;

* * *

(d) and (e) are in the classified annex to this opinion.

Our task is to determine whether a rational nexus exists between these factors and the national security so as to justify the security determination which was the sole basis for Krc's termination. We stress that questions of suitability are not before us, and our discussion is not intended to imply approval or endorsement of Krc's conduct.

C. Nexus

We review below the factors asserted and relied upon by the agency to revoke grievant's overseas security clearance.

(a) Krc knowingly violated the agency's fraternization policy prohibiting sexual intimacy with Yugoslav

> nationals, about which he was briefed before his departure for Yugoslavia.

The fraternization policy in effect in Yugoslavia during Krc's tour was considerably more liberal than it had been earlier, and differed substantially from the more restrictive policy applicable to Soviet Bloc nations. It is clear that Embassy policy, as interpreted and applied by the resident Regional Security Officer (RSO) in Belgrade, who briefed Krc and other Foreign Service members on their arrival at post, did not prohibit casual sexual encounters with Yugoslav nationals.

Security Director Dowling, nonetheless, strongly believed that grievant had been told before going to Yugoslavia that agency policy prohibited sexual contacts with Yugoslav nationals. The evidence, however, does not support this belief. The written post policy was shown to Krc when he was briefed by an agency Security Officer before departing for Yugoslavia, and it is consistent with the position taken at post which did not bar casual sexual contact in a dating context. Krc testified that he was told at this briefing that he was fortunate to be going to Yugoslavia where other restrictions applicable to Soviet Bloc nations did not apply. He also said that he reviewed the policy shown to him line by line with the Security Officer and that nothing was said about sexual contacts as such. Krc did sign an acknowledgment that among other points his briefing covered:

> Policies regarding social contact and prohibition of sexual intimacies with Communist country nationals. Employee has read the current post policy concerning social relations with host nationals.

The post policy which he was shown, however, prohibited only those areas of contact "that involve or potentially involve, prospects for strong emotional or personal involvement."

There is no indication in the Record that Security verified the details of Krc's briefing before deciding to revoke his overseas security clearance. The evidence regarding his briefing in Washington and on arrival in Belgrade does not

show that he was aware that agency policy, in contrast to the Department of State and post policy, prohibited casual sexual encounters with Yugoslav nationals. There is no other evidence that he was actually informed that a total ban on sexual conduct was agency policy or that his sexual conduct with two Yugoslav nationals on four or five occasions went beyond that permitted by Embassy policy and what he reasonably thought was corresponding agency policy.

The record further reveals that Security has never revoked an employee's total overseas clearance even when there have been clear violations of fraternization policies in effect in Communist countries in the past, although it has barred assignment to Communist countries in some instances.

(b) Krc showed poor judgment and was indiscreet in his homosexual conduct and openness about his homosexuality.

The essence of this charge is that Krc conducted himself in such a way that hostile foreign intelligence services were likely to find out that he was homosexual and that he engaged in homosexual conduct. According to Dowling, such intelligence services are known to use sexual conduct as a basis for coercion. The underlying presumption here, of course, is that an individual who engages in homosexual conduct is vulnerable to coercion if this becomes known to hostile intelligence services. Such a presumption is unjustified, however, unless the individual wishes or has reason to hide his homosexuality or sexual conduct, or there are other grounds for questioning his ability to protect national security. There is no evidence that either is true in Krc's case.

Krc has done nothing to hide or deny his homosexuality or sexual conduct, although he did not advertise it. Once the subject was raised, he openly and freely discussed his sexual orientation and conduct with Security. As discussed above, he reasonably believed his conduct while in Yugoslavia did not violate U.S. Government policy. As detailed below, he has shown that he is sensitive to local laws proscribing

homosexual conduct; there is no evidentiary basis on which to believe he is likely to run afoul of such laws.

(c) Krc violated and/or would be likely in the future to violate local law in the conduct of his homosexual relationships.

The agency has introduced into the record a 1980 survey purporting to reflect legal and social toleration or prohibition of homosexuality in various countries, indicating that it is frequently illegal. This survey, which the agency evidently relied upon in assessing the legality of Krc's sexual conduct while in Yugoslavia, indicates that homosexuality is illegal in Yugoslavia, as such, without any reference to the separate laws of its constituent republics. Krc asserts, on the other hand, that he had made a careful search of applicable laws concerning homosexuality in the various republics of Yugoslavia, and discussed with other Foreign Service members the general attitude and climate regarding homosexuality in that country. With the exception of relations conducted in his Embassy apartment, which he believed were insulated from local law, his homosexual relations were confined to a weekend he spent with the Swedish assistant military attache at a hotel in Dubrovnik, where his research indicated such conduct was not illegal. Whatever may be the precise state of local law concerning homosexuality in the various republics of Yugoslavia, we are persuaded that Krc intended to tailor his sexual conduct so as not to violate local law.

In his statement to the agency in August 1984, Krc mentioned a total of eight or ten individuals with whom he had homosexual relations since joining the agency. Five or six of these relationships, two of which occurred in Yugoslavia, were with fellow agency and State Department officers. None of those officers have been given restricted security clearances. They were merely advised to report any apparently hostile contacts in the future. There is no evidence on which to conclude that Krc is more likely than these other officers to violate foreign laws proscribing homosexual activity. To the contrary, the Board credits Krc's

testimony that if the practice of homosexuality were prohibited in a country of assignment, he would be prepared to remain sexually inactive while there.

Discussion of (d) and (e) will be found in the classified annex.

Conclusions Regarding Nexus

Agency policy, as stated in its response to an interrogatory submitted as part of this grievance, is that:

> An individual candidate's or incumbent's sexual preference (heterosexual, homosexual, or other forms of sexual activity), per se, is not considered a basis for denial of a security clearance to a candidate, permanent revocation of a security clearance already granted, or placing restrictions on the assignments of an incumbent who has security clearance. The major security concern is the actual sexual conduct of the individual and the circumstances surrounding it. The Agency's position is that any sexual conduct which a hostile intelligence service may perceive to be exploitable requires an investigation, evaluation, and determination from the USIA Security Office. ***

The agency's decision to bar Krc from any overseas assignment on the basis of his sexual and other related conduct is not justifiable if there is no rational basis on which to conclude that such assignment would pose a security threat to the United States. It is not enough that there is evidence that he might be approached abroad by a hostile intelligence service that believed he was exploitable, if there is no rational basis on which to conclude that he is exploitable or otherwise cannot be relied upon to protect the security interests of the United States while serving in any overseas capacity.

The agency's Office of Security believes that Krc violated the agency's fraternization policy and that Krc might violate the laws of any country to which he is posted which forbids homosexual conduct, thereby rendering himself vulnerable to coercion. We see no reasonable evidentiary support, however, for this belief on the agency's part. Krc has shown

that his conduct was within the limits of the fraternization policy established by the Embassy and State Department, and that to the extent the agency purports to have had a more stringent policy it was not effectively communicated to him. He has testified that he can and will tailor his sexual conduct so as to not violate local law. There is no contrary evidence to support a finding that he is more likely to violate local law governing sexual conduct than other Foreign Service officers, including other homosexuals who have not had their overseas security clearance revoked.

We are required to give deference to the expertise and knowledge possessed by agency security officers in their evaluation of information and their conclusions drawn therefrom, but the law also requires that we sustain a grievance if there is no rational nexus between the information developed by Security and the action taken by the agency. We find there is no such nexus in this case.

D. Remedy

In light of our findings above, the restriction imposed by the Office of Security barring grievant from any foreign service assignment must be removed. Because that restriction was concededly the cause of the agency's decision to separate Krc from the Foreign Service, the separation should be withdrawn by the agency and Garcia's January 25, 1985 memorandum to Krc and the separation action which followed should be removed from Krc's Official Personnel File. Krc should be reinstated in the Foreign Service as an FSO-4 at the step he would have been entitled to but for his unwarranted separation. See *Reiner v. United States*, 686 F.2d 1017, 1021 (D.C. Cir. 1982) (quoting *Reiner v. United States*, C.A. No. 78-0616, slip op. at 7 (D.D.C. 1979)).

Krc has also asked this Board to recommend that he be granted career status in USIA's Foreign Service. This remedy is not available, however, in light of the U.S. Court of Appeals' holding in *Daniels v. Wick*, No. 86-5234, C.A.D.C.C., slip op. (Feb. 27, 1987). The court found in that case, involving a USIA grievance, that the Foreign

Service Act of 1980 did not authorize this Board to recommend tenure for career candidates, a function which the court concluded was delegated exclusively to the statutory boards established for that purpose.

In its opinion in *Daniels*, the court also addressed, without deciding, the Board's authority to extend the duration of a limited appointment beyond the maximum five year period specified in section 309 of the Act. The court reasoned that if a limited appointee has been discriminated against or otherwise improperly denied the chance to show his or her mettle for a career appointment during those five years, then additional time should be provided so that the limited appointee could have an unencumbered five year trial period as contemplated by section 309 (slip op. at 17-18). As the court noted, in the Daniels grievance the Acting Director of USIA had petitioned this Board to extend Daniels' appointment beyond its termination date on the basis of section 1107 of the Act, which gives the Board authority to retain a person in the Foreign Service, and the Board did in fact direct that Daniels be given such an extension.

The Department of State has announced a somewhat different approach to this issue, but one that achieves essentially the same results. In its March 1984 newsletter, State, page 58, it noted that when the Department found a career candidate's grievance meritorious, the Secretary--

> may determine that the grievant has not had a full and fair period in which to achieve tenure and that an extraordinary relief is the proper remedy (i.e., a new limited appointment of sufficient duration to assure each career candidate has the same fair period in which he or she must be tenured). Likewise, the Department believes the Foreign Service Grievance Board can recommend

such a remedy when it finds merit in cases presented to it.[1/]

On the basis of the agency positions indicated above and the views expressed by the Court of Appeals in *Daniels*, we conclude that this Board has authority under the Act to order either an extension of a limited appointment or a new limited appointment where that is necessary to provide a career candidate with an unencumbered five year term in which to attain career status, as contemplated by section 309.

In the present case, Krc began his career candidacy in September 1982 as an FS-05 and was transferred to Belgrade in August 1983. He was promoted to FS-04 in April 1984 and returned from Belgrade in August of that year. For the next several months he unsuccessfully contested his proposed separation and then transferred to the Civil Service in March 1985. His career candidacy, however, effectively ended in August 1984 when Security denied him clearance to go overseas. If that had not occurred, he could have expected to achieve career status with the majority of his peers at least by the fall of 1986 since he had been promoted and already possessed the language proficiency required for commissioning. Even after Krc is reinstated in the Foreign Service pursuant to this decision and given a suitable assignment with which to resume his candidacy, he will be handicapped by the three year interruption in his performance record. While we will instruct the agency to insert a suitable explanation of why there are no evaluations for that period, it will be extremely difficult to explain satisfactorily why he had no overseas--or even domestic--Foreign Service assignments during that period. In effect, Krc's situation will be as if he were starting at the beginning, not in the middle,

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[1/]Those views were first stated in an exchange of correspondence in October and November 1983 between the Department and Congresswoman Patricia Schroeder, Chairwoman, House Subcommittee on Civil Service, Committee on Post Office and Civil Service. Since then the Department has filed several settlement agreements with the Board in which this policy has been applied, including G-84-015, G-84-065 and G-85-005.

of his candidacy to prove his qualifications for commissioning. The only way in which he can properly compete, in our judgment, is to have the maximum uninterrupted statutory five year period in which to develop a performance record unblemished by long gaps in both assignments and evaluation reports.

V. DECISION

The Board directs the U.S. Information Agency to:

1. Remove the blanket restriction imposed by the Office of Security barring grievant from any overseas assignment.
2. Reinstate grievant in the agency's Foreign Service with a new appointment as a career candidate for a term of five years. He should be reinstated as an FSO-4 at the step he would have attained had he not been separated.
3. Remove all documentation and references from grievant's official records, including Official Personnel and Security files, concerning revocation of his overseas security clearance and his consequent separation from the Foreign Service.
4. Place a statement acceptable to grievant in his Official Personnel File which will explain the absence of reports in his foreign service evaluation records caused by his separation.

Grievant may submit documentation justifying attorney fees within thirty days of the date of this decision. The agency will have two weeks in which to respond to grievant's submission.

We, the undersigned members of the Foreign Service Grievance Board, hereby submit for action to the Chief, Labor Relations Staff, our findings and directives in the grievance case of Jan Krc, an employee of the U.S. Information Agency.

This remedial order to the U. S. Information Agency is made under the authority granted to the Foreign Service Grievance Board by the Foreign Service Act of 1980 and by the regulations established thereunder.

/s/ Shyam Das
Shyam Das
Presiding Member

/s/ Ronald G. Russell
Ronald G. Russell
Member

/s/ Stanley J. Siegel
Stanley J. Siegel
Member

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment V, provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

2. Section 105 of the Foreign Service Act of 1980, 22 U.S.C. §§ 3905(a)(1), 3905(b)(4), provides in pertinent part as follows:

> All personnel actions with respect to career members and career candidates in the Service (including applicants for career candidate appointments) shall be made in accordance with merit principles.
>
> * * *
>
> The secretary shall administer the provisions of this chapter . . . to ensure that members of the Service, as well as applicants for appointments in the Service -- are free from any personnel practice prohibited by section 2302 of Title 5.

3. Section 610 of the Foreign Service Act of 1980, 22 U.S.C. § 4010(a)(2), provides in pertinent part as follows:

> A member of the Service who is . . . assigned to a salary class in the Foreign Service Schedule and who either (A) is serving under a career appointment, or (B) if separation is to be by reason of misconduct, is serving under a limited appointment, shall not be separated from the Service under this section until the member has

> been granted a hearing before the Foreign Service Grievance Board and the cause for separation established at such hearing . . . .

4. Section 611 of the Foreign Service Act of 1980, 22 U.S.C. § 4011, provides in pertinent part as follows:

> Except as provided in section 4010(a)(2) of this title, the Secretary may terminate at any time the appointment of a member of the Service serving under a limited appointment . . . .

5. Section 1011 of the Foreign Service Act of 1980, 22 U.S.C. § 4131(a), provides in pertinent part as follows:

> (1) Except as provided in subsection (b) of this section, for purposes of this subchapter, the term "grievance" means any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service who is a citizen of the United States of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including --
>
> > (A) separation of the member allegedly contrary to laws or regulations, or predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member . . . .

6. The Foreign Service Manual, 3 F.A.M. § 622.9, provides in pertinent part as follows:

> Standards of Conduct
>
> To maintain the efficiency of the Service, the following, while not all inclusive, may constitute grounds for taking disciplinary or separation action against an employee . . . .
>
> * * *
>
> (k) Conduct which clearly shows poor judgment or lack of discretion which may reasonably affect an individual or the agency's ability to carry out its responsibilities or mission.

No. 93-599

FILED
JAN 13 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAN KRC, PETITIONER

v.

UNITED STATES INFORMATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' decision after remand was consistent with its decision before remand.

2. Whether the courts below correctly determined that summary judgment on petitioner's equal protection claim was appropriate.

3. Whether the United States Information Agency's (USIA) termination of petitioner's limited appointment to the Foreign Service comported with due process.

4. Whether the USIA's decision to terminate a limited appointment to the Foreign Service pursuant to Section 611 of the Foreign Service Act of 1980 (Act), 22 U.S.C. 4011, is "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2).

5. Whether the courts below correctly concluded that the Foreign Service Grievance Board lacked jurisdiction to review petitioner's challenge to the termination of his limited appointment under Section 611 of the Act, because terminations under Section 611 are expressly excluded from the definition of "grievance[s]" over which the Board has jurisdiction, 22 U.S.C. 4131(b)(3).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 5a-34a) is reported at 989 F.2d 1211. The opinion of the court of appeals before remand (Pet. App. 35a-54a) is reported at 905 F.2d 389. The opinions and orders of the district court after remand (Pet. App. 55a-68a) and before remand (Pet. App. 69a-83a, 86a-90a) are unreported. The decisions of the Foreign Service Grievance Board (Pet. App. 92a-100a and 101a-119a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1993. A petition for rehearing was denied on July 23, 1993. Pet. App. 4a. The petition for a writ of certiorari was filed on October 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In September, 1982, petitioner entered the Foreign Service under a limited appointment as an officer candidate. In 1983 he was posted to Belgrade, Yugoslavia, as a Foreign Service Information Officer for the USIA. During this posting, petitioner engaged in homosexual conduct with numerous other people, including two other Foreign Service officers, the assistant military attache of a non-NATO country, and two nationals of a Communist country. Petitioner revealed that conduct to a USIA security officer during a debriefing at the end of his posting. Pet. App. 6a, 37a, 70a-71a, 92a-93a.[1]

After an investigation into petitioner's homosexual conduct in Belgrade, the Personnel Director of USIA, Angie Garcia, notified petitioner in October, 1984, that she was recommending that his limited appointment be terminated pursuant to Sections 610 and 611 of the Foreign Service Act, 22 U.S.C. 4010, 4011, based on his misconduct in violating USIA's fraternization policy.[2] In a subsequent meeting with

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[1] During petitioner's posting in Belgrade, USIA received secret information concerning petitioner, about which he was also questioned during his debriefing. Pet. App. 6a. The information was filed under seal with the district court and the court of appeals and is available to this Court upon request. *Ibid.*

[2] Section 611 of the Foreign Service Act, 22 U.S.C. 4011, provides in pertinent part:

> Except as provided in section 4010(a)(2) of this title, the Secretary [of State] may terminate at any time the appointment of any member of the Service serving under a limited appointment * * *.

The provision to which Section 611 refers, Section 4010(a)(2) of Title 22 (§ 610(a)(2) of the Act), provides in relevant part:

Garcia, petitioner claimed that he had not been told of that policy. Based on that claim, Garcia withdrew the proposed termination in December, 1984, and issued, instead, a letter of reprimand "based on the poor judg[]ment and indiscretion demonstrated by [petitioner's] actions." Pet. App. 6a; see also *id.* at 38a, 71a, 93a-94a, 102a-103a.

In January, 1985, the USIA Director of Security, Bernard Dowling, told Garcia in a written memorandum that he would "not approve any foreign service assignment of [petitioner] because of the strong security risk involved." Pet. App. 6a. Dowling's memorandum stated:

> I have again reviewed [petitioner's] security file, particularly his actions at his last overseas post. As you know, he submitted a signed statement to the Office of Security on August 21, 1984 wherein he admitted engaging in homosexual relationships with eight different men, including two citizens of Yugoslavia while he was serving in Belgrade, Yugoslavia.[3] By engaging in such conduct, he not only showed poor judgment and lack of discretion, he also committed acts which we feel

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A member of the Service who * * * is assigned to a salary class in the Foreign Service Schedule and who * * * (B) if separation is to be by reason of misconduct, is serving under a limited appointment, shall not be separated from the Service under this section until the member has been granted a hearing before the Foreign Service Grievance Board and the cause for separation established at such hearing * * *.

[3] It appears that petitioner admitted to engaging in homosexual conduct with five, not eight, people while in Belgrade. 91-5339 Gov't C.A. Br. 5.

> make him a security risk in any foreign service assignment. Specifically, he admitted that he had been open about his homosexuality with a number of other Yugoslav nationals with whom he socialized, including those who would obviously be relied upon as informants by hostile intelligence services. Therefore, to allow [petitioner] to serve in an overseas capacity would be an intolerable security risk since his homosexuality would make him an extremely likely target for hostile intelligence approaches. Also, in some seventy foreign countries homosexual acts are illegal and punishable by law. Therefore, by [*sic*] simply engaging in homosexual activity while overseas would place him in violation of the laws of most foreign countries thus further increasing his vulnerability to hostile approaches. Consequently, I will not approve any foreign service assignment of [petitioner] because of the strong security risk involved.
>
> This should not preclude him from a domestic assignment where possible hostile intelligence approaches are less bold and can be more carefully monitored and controlled.

Pet. App. 103a.

On January 25, 1985, Garcia notified petitioner that she was terminating his limited appointment "by authority of Section 611 [of the Foreign Service Act]." Pet. App. 40a. She explained that, because of the Office of Security's determination that he could not receive security clearance for any overseas assignments, there was no need for his services in the Foreign Service. *Id.* at 104a. She emphasized that the termination of petitioner's limited appointment

was "not a disciplinary or performance-based action." *Id.* at 40a.

The termination of petitioner's limited appointment took effect on March 2, 1985. Pet. App. 7a. The next day, petitioner was appointed to a domestic civil service appointment at a higher salary. *Id.* at 38a. Petitioner remained in this appointment until October, 1993, when he secured a limited Foreign Service appointment in the Department of State. Pet. 3 n.1.

b. Petitioner filed a complaint with the Foreign Service Grievance Board (FSGB or Board) challenging the termination of his limited appointment. See Pet. App. 7a. In March, 1987, the Board ordered the USIA to reinstate petitioner with a five-year appointment as an officer candidate and to remove the restriction withholding security clearance from petitioner for overseas assignments. *Id.* at 118a.

The Board first determined that it had jurisdiction over petitioner's complaint. Pet. App. 107a-109a. The Board deemed it unnecessary to decide whether, as USIA argued, the termination of petitioner's limited appointment was unreviewable because it was made pursuant to Section 611 of the Act. See 22 U.S.C. 4131(b)(3) (excluding "the termination of a limited appointment under section [6]11 of th[e] [Act]" from the definition of "grievance[s]" over which the Board has jurisdiction). In the Board's view, even if it lacked jurisdiction to review USIA's decision to terminate the appointment, it had authority to review USIA's decision to deny petitioner security clearance for overseas assignments under the Federal Circuit's decision in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), rev'd, 484 U.S. 518 (1988). Pet. App. 107a-109a. If the denial of overseas security clearance was

erroneous, the Board reasoned, then so too was the termination of petitioner's limited appointment, since the termination "was based solely on the determination of the [USIA] Office of Security not to clear [petitioner] for an overseas assignment." *Id.* at 106a.

Applying the standard of review adopted by the Federal Circuit in *Egan*, the Board determined that there was no "rational nexus" between the USIA's denial of overseas security clearance to petitioner and the evidence on which the denial was based. Pet. App. 115a; see also *id.* at 109a. The Board credited petitioner's claim that he had not been told of USIA's fraternization policy at the time of his posting to Belgrade. *Id.* at 111a-112a. The Board also credited petitioner's assertion that "if the practice of homosexuality were prohibited in a country of assignment, he would be prepared to remain sexually inactive while there." *Id.* at 114a. Based on those assertions, the Board concluded that there was no reason to believe that petitioner would violate the laws regarding homosexual conduct in any foreign country to which he was posted or that he posed a security risk. *Id.* at 113a-115a.

2. The USIA commenced this action in the United States District Court for the District of Columbia, seeking to set aside the Board's order. Petitioner counterclaimed for enforcement of the order. In addition, petitioner claimed that the USIA's failure to comply with the order violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and deprived him of liberty and property without due process. See Pet. App. 39a. In an amended counterclaim, petitioner also alleged a violation of the equal protection component of the Due Process Clause,

interference with his employment opportunities, and unlawful reprisal. *Ibid.*; see also *id.* at 52a.

On April 20, 1989, the district court granted the USIA's motion to set aside the Board's order. Pet. App. 69a-83a. It held that the Board "did not have the authority to review USIA's revocation of [petitioner's] security approval for overseas service." *Id.* at 79a. In so holding, the court relied on this Court's decision in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), which was handed down after the Board's decision and which reversed the decision of the Federal Circuit upon which the Board had relied. See Pet. App. 39a.[4] The court also dismissed petitioner's claim that he had been deprived of a property interest without due process. *Id.* at 81a. Subsequently, on May 31, 1989, the court dismissed petitioner's claims that he had been deprived of liberty without due process and that USIA's action violated the APA. *Id.* at 86a-90a.

3. The court of appeals affirmed all of the district court's rulings. It remanded the case to the district court, however, for consideration of the claims in petitioner's amended counterclaim that the district court had not yet considered. Pet. App. 35a-36a.

The court of appeals held, first, that the Board did not have jurisdiction to review either the termination of petitioner's limited appointment or the security clearance decision underlying the termination. Pet.

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[4] In *Egan*, a government employee was removed from his position because he was denied the security clearance necessary for that position. 484 U.S. at 520-523. This Court held that, although the Merit Systems Protection Board could review the removal, the Board could not review the underlying denial of security clearance. *Id.* at 525-534.

App. 40a-44a. The court determined that the termination of petitioner's limited appointment was not a "grievance" within the Board's jurisdiction, because it was "legitimately classified under § 611," rather than under Section 610(a)(2) of the Act. The court adopted the Board's finding that the termination of petitioner's appointment was not made "by reason of misconduct" within the meaning of Section 610(a)(2) but instead "was based solely on the determination of the Office of Security not to clear [petitioner] for an overseas assignment." Pet. App. 41a. However, the court rejected the Board's theory that, even if it lacked authority to review the termination itself, it could nevertheless review the security clearance decision underlying the termination. *Id.* at 43a.

The court of appeals affirmed the dismissal of petitioner's APA claim. It held that the USIA's termination of petitioner's limited appointment was not reviewable under the APA because it was "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The court observed that the provision under which petitioner's appointment was terminated, Section 611 of the Foreign Service Act, "imposes fewer shackles on the agency head's decisionmaking than the corresponding provision in the 1947 National Security Act, which the Supreme Court [in *Webster* v. *Doe*, 486 U.S. 592 (1988)] found precluded judicial review." Pet. App. 45a.

The court of appeals also affirmed the dismissal of petitioner's claims that he had been deprived of property and liberty without due process. Pet. App. 47a-51a. The court observed that, to demonstrate deprivation of a protected liberty interest, petitioner was required to "show that the agency altered his status in a tangible way, and that an imposition of

stigma or injury to reputation accompanied this change in status." *Id.* at 47a. The court explained that petitioner's status had not changed in a constitutionally cognizable way because, after his appointment was terminated, he was hired by USIA in a different capacity with a pay increase. *Ibid.* Petitioner had not shown damage to his reputation, the court determined, because "USIA's termination letter explicitly stated that he was not disqualified from any future domestic government employment, and the record contains no evidence that [petitioner's] attractiveness to potential employers has been reduced." *Id.* at 48a (citations and internal quotation marks omitted). The court further held that petitioner's "circumscribed" property interest in his limited appointment had been terminated by procedures, and under a standard, that satisfied due process. *Id.* at 49a-50a.

4. On remand, petitioner claimed that USIA had deprived him of equal protection by terminating his limited appointment on the basis of his sexual orientation. Pet. App. 56a-57a. The district court granted summary judgment for USIA on that claim. *Id.* at 57a-59a. The court reaffirmed its prior determination that "USIA did not deny [petitioner] security clearance approval for overseas service because of his homosexuality, but because of the particular homosexual conduct that he engaged in while in Belgrade." *Id.* at 57a (internal quotation marks omitted).[5]

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[5] The district court also granted summary judgment for USIA on petitioner's claim of interference with prospective employment. That claim was based on a letter from USIA to the Defense Industrial Security Clearance Office (DISCO) re-

5. The court of appeals again affirmed all of the district court's rulings, this time by a divided vote. Pet. App. 5a-34a. A majority of the panel upheld the district court's award of summary judgment to USIA on petitioner's equal protection claim. *Id.* at 8a-12a.

The court of appeals observed that, by analogy to the framework for "mixed motive" Title VII claims outlined in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), petitioner could not prevail on his equal protection claim, even if his sexual orientation played some role in USIA's termination of his appointment and constituted an impermissible factor, if USIA could prove that it "would have made the same decision even in the absence of the impermissible factor." Pet. App. 9a. The court determined that such proof had been established by undisputed evidence. Thus, the court found that "[i]n this case, it is clear that the USIA would have terminated [petitioner] from the Foreign Service on the basis of his conduct, *i.e.*, regardless of his sexual orientation." *Ibid.* The court also found it "beyond genuine dispute that the

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sponding "yes" to the question whether USIA had any "adverse information" on petitioner. Relying on the exception in the Federal Tort Claims Act precluding liability for "claim[s] arising out of * * * interference with contract rights," 28 U.S.C. 2680(h), the court held that petitioner's claim was barred by sovereign immunity. Pet. App. 60a-61a. In the alternative, the court held that USIA's response to DISCO's inquiry was not actionable because it "was no more than an accurate response to an authorized inquiry." *Id.* at 62a (footnote omitted). Finally, the district court held that it lacked jurisdiction over petitioner's reprisal claim. *Id.* at 63a-67a.

The court of appeals affirmed the dismissal of petitioner's interference and reprisal claims, Pet. App. 12a-15a, and they are not at issue in this Court.

USIA would have terminated the Foreign Service appointment of an officer who had heterosexual escapades with the military attache of a neutral country and with nationals of a Communist country." Such conduct, the court remarked, "reflects appallingly poor judgment and virtually invites an approach from a hostile intelligence service." *Ibid.* The court also observed that "[petitioner] can point to no pattern, or even instance, of USI[A] disciplinary action to suggest that the agency discriminated against him in his security review on account of his homosexuality." *Id.* at 11a.

The majority then addressed the dissent's assertion that its analysis of petitioner's equal protection claim was inconsistent with the court's decision when petitioner had previously been before it (*Krc I*). Pet. App. 10a n.*. In *Krc I*, the majority explained, the court of appeals had held that petitioner's limited appointment had not been terminated for "misconduct" within the meaning of Section 610(a)(2) of the Act. Pet. App. 10a n.*. But the majority observed that "conduct that is not misconduct can have an adverse national security implication" and thus be relevant "to the USIA's determination about an individual's fitness for Foreign Service duty overseas." *Ibid.* That was the case here: "[S]everal factors, especially [petitioner's] ill-advised conduct, contributed to the agency's decision to terminate [petitioner's] Foreign Service appointment." *Ibid.* Even if one of those factors was petitioner's sexual orientation, the majority found it "perfectly clear that the USIA would have terminated [petitioner's] Foreign Service appointment based solely upon the legitimate reasons it gave—i.e., [petitioner's] sexual

indiscretions in combination with the Secret information regarding him." *Id.* at 11a n.*.

Judge Wald dissented from the majority's affirmance of summary judgment for USIA on petitioner's equal protection claim. Pet. App. 15a-34a.[6] She believed that the court of appeals in *Krc I* decided that the termination of petitioner's limited appointment "stemmed from [petitioner's] sexual orientation, not from any lack of judgment evinced by his sexual conduct." *Id.* at 15a. She also believed that, in any event, there was a genuine dispute of fact whether petitioner's sexual orientation played a role in the termination of his appointment. *Id.* at 23a-33a.

ARGUMENT

1. Petitioner first contends (Pet. 12) that the court of appeals' decisions in *Krc I* and *Krc II* "are squarely in conflict." That contention does not merit further review.

a. This Court ordinarily does not grant review to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In addition, the asserted conflict between *Krc I* and *Krc II* does not involve any issue of broad importance. On the contrary, the alleged conflict is entirely case-specific: whether petitioner's limited appointment in the Foreign Service was terminated because of his conduct or because of his sexual orientation. That issue would not warrant further review even if it were the subject of a conflict in the courts below.

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[6] Judge Wald also dissented from the majority's affirmance of the award of summary judgment for USIA on petitioner's interference-with-employment claim. She concurred, however, in the affirmance of the district court's dismissal of the reprisal claim. Pet. App. 19a n.3.

b. In any event, *Krc I* and *Krc II* do not conflict. The two decisions involved different issues, and the court of appeals resolved those issues in a consistent manner.[7]

i. The issue in *Krc I* was whether the Foreign Service Grievance Board had jurisdiction over petitioner's challenge to the termination of his limited appointment. The resolution of that issue depended on the reason for the termination. If petitioner's appointment was terminated "by reason of misconduct," then it was a termination under Section 610(a)(2) of the 1980 Foreign Service Act, 22 U.S.C. 4010(a)(2)(B), which the Board had jurisdiction to review. On the other hand, if petitioner's appointment was terminated for some reason other than misconduct, then it was properly classified as a termination under Section 611 of the Act, which the Board lacked authority to review. 22 U.S.C. 4131(b)(3).

The court of appeals in *Krc I* held that petitioner's appointment was not terminated because of "misconduct." Instead, the court determined, the termination was based on the Office of Security's decision to revoke petitioner's security clearance for overseas assignments; it was not based on whether petitioner had "violated a canon of conduct governing Foreign Service officers." Pet. App. 41a. The court's determination was consistent with the Board's finding that petitioner's termination "was based solely on the determination of the [USIA] Office of Security not to

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[7] The court of appeals in *Krc II* specifically addressed the asserted conflict and decided that no such conflict exists. Pet. App. 10a n.*. Moreover, the D.C. Circuit's denial of rehearing en banc reflects the full court's judgment that there is no conflict requiring resolution. *Id.* at 2a.

clear [petitioner] for an overseas assignment." *Id.* at 106a.

The distinction between the termination of petitioner's limited appointment, on the one hand, and the security decision that led to the termination, on the other hand, is a meaningful one. As the court in *Krc I* held in a ruling that petitioner does not challenge in this Court, the Board had no jurisdiction to review USIA's revocation of overseas security clearance. Pet. App. 42a-44a. That holding follows from this Court's decision in *Egan*, which held that, even though the Merit Systems Protection Board (MSPB) had authority to review the removal of a government employee, it lacked authority to review the denial of security clearance that led to the employee's removal. 484 U.S. at 525-534.[8]

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[8] As the court of appeals recognized, "*Egan* does not squarely control the FSGB's authority here," because the FSGB's authority derives from a different statute than the one that governs the MSPB's authority to review personnel actions, and because this case involves a modification, rather than a denial, of a security clearance. Pet. App. 42a-43a. Nonetheless, the court of appeals correctly determined that *Egan* is instructive here for two reasons. First, "[t]he *nature* of USIA's decision [modifying petitioner's security clearance] * * * is analogous to the Navy's decision in *Egan*," because both represented the agency's "[assessment] whether, under compulsion of circumstances or for other reasons, [petitioner] might compromise sensitive information." *Id.* at 43a, quoting *Egan*, 484 U.S. at 528 (some bracketed material supplied by court of appeals; some bracketed material added). Second, the FSGB, like the MSPB, "does not appear to be the kind of inside expert body that, *Egan* suggested, might be qualified to review the substance of the agency's [security] decision." Pet. App. 43a; see 22 U.S.C. 4135(a) (FSGB composed of "independent" citizens "who are not employees of the Department [of State] or members of the [Foreign] Service").

ii. Unlike the court of appeals in *Krc I*, the court of appeals in *Krc II* did address the question whether USIA's decision to revoke petitioner's overseas security clearance was based on conduct. That issue was before the court because of petitioner's equal protection challenge to USIA's decision. Cf. *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988).

The court in *Krc II* held that USIA's security clearance decision was based on his sexual conduct, and not on his sexual orientation. That holding rested on the undisputed evidence "that the USIA would have terminated the Foreign Service appointment of an officer who had heterosexual escapades with the military attache of a neutral country and with nationals of a Communist country," Pet. App. 9a, and the lack of evidence of any "pattern, or even instance, of USI[A] disciplinary action to suggest that the agency discriminated against [petitioner] in his security review on account of his homosexuality." *Id.* at 11a. The holding in *Krc II* concerning the reason for the *security clearance decision* thus plainly did not conflict with the holding in *Krc I* on the different issue of the reason for the termination of petitioner's limited appointment.

2. Petitioner next contends (Pet. 15-17) that the courts below erred in granting summary judgment in favor of USIA on his equal protection claim. That fact-bound contention does not warrant further review.

Petitioner criticizes the court of appeals for relying on *Price Waterhouse* to determine the burdens of proof on his equal protection claim on the ground that *Price Waterhouse* was not cited in the USIA's briefs. Pet. 15. Petitioner does not challenge the court of appeals' determination that *Price Water-*

house provides the appropriate framework for assessing his claim. See Pet. App. 8a-9a. Instead, petitioner challenges only the court of appeals' determination that there was no genuine dispute that he was denied overseas security clearance because of his sexual conduct and not because of his sexual orientation. The district court, however, also determined that "[t]he government did not deny [petitioner] security clearance approval for overseas service because of his homosexuality, but because of the particular homosexual conduct that he engaged in while in Belgrade." Pet. App. 82a-83a; see also *id.* at 57a. Thus, at bottom petitioner's challenge to the award of summary judgment is based on his disagreement with findings of fact concurred in by both courts below. This Court generally does not review such challenges, see, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967), and petitioner provides no reason for the Court to depart from that practice in this case.

Nor does the partial dissent in *Krc II* suggest any need for review by this Court. In her dissent, Judge Wald cited three items of evidence that she believed suggested that the decision to revoke petitioner's overseas security clearance was based on his sexual orientation. Pet. App. 18a-19a. The majority reasonably concluded, however, that the evidence before the district court did not create a genuine factual dispute. Judge Wald cited, first, the memorandum in which the USIA Director of Security, Bernard Dowling, explained why he was denying petitioner overseas security clearance. *Id.* at 19a. That memorandum (reproduced in full at pp. 3-4, *supra*, and at Pet. App.

103a) focused on petitioner's conduct, not his orientation.[9] Judge Wald next cited testimony that another member of the USIA's Security Office said that petitioner's "problem" was his "sexual preference," a "type of behavior" that the Foreign Service does not "condone." *Id.* at 19a. Testimony that homosexual "behavior" is generally not "condone[d]," however, is not equivalent to evidence that petitioner was discriminated against because of his homosexual orientation. Finally, Judge Wald cited testimony concerning a statement by Dowling "suggest[ing]" that he considered homosexuality a disqualification for employment in the Foreign Service. *Ibid.* The relevance of that testimony is extremely attenuated, because (1) it related to a single statement; (2) that statement did not relate to petitioner; (3) the statement was made a significant amount of time after the challenged conduct took place; (4) the statement was only "suggest[ive]" of bias based on sexual orientation; and (5) the statement apparently did not purport to reflect agency policy. In sum, Judge Wald's dissent suggests, at most, that reasonable minds could differ on the question whether the evidence sufficed to preclude summary judgment on petitioner's equal protection claim. And that fact-bound question does not warrant this Court's review.

3. Petitioner renews his contention (Pet. 17-19) that the termination of his limited appointment

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[9] Although Judge Wald attached significance (Pet. App. 18a-19a) to the statements in the memorandum that petitioner "had been open about his homosexuality with a number of other Yugoslav nationals," and that homosexual conduct is illegal in 70 other countries, *id.* at 103a, those statements refer to conduct, not sexual orientation.

violated the Due Process Clause. The court of appeals in *Krc I* correctly rejected that contention. Pet. App. 47a-51a.

The court of appeals in *Krc I* correctly held that USIA did not deprive petitioner of a protected property interest without due process. As the court recognized, petitioner's property interest in his limited appointment was only "a circumscribed one." Pet. App. 50a; see *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). As the court explained, under the statutes and regulations governing limited appointments, "USIA retains discretion to determine when the need no longer exists for the employee's services or when continued employment would not promote the efficiency of the Service." Pet. App. 50a (internal quotation marks and citations omitted); see 22 U.S.C. 3905, 4010(a)(1); 3 Foreign Affairs Manual § 767.1 (1984). The court then correctly determined that it was reasonable for USIA to terminate petitioner's limited property interest based on the conclusion that there was no further need for his services after his overseas security clearance had been revoked. Pet. App. 50a. And as both the district court and the court of appeals subsequently held in *Krc II*, the revocation of petitioner's security clearance was reasonable in light of his conduct in Belgrade. Pet. App. 8a-12a, 57a-59a.[10]

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[10] Petitioner criticizes (Pet. 18) the court of appeals for failing in *Krc I* to address whether the revocation of his security clearance for overseas assignments was "patently arbitrary or discriminatory," and thus a violation of substantive due process. That criticism is unfounded, since petitioner did not allege a violation of substantive due process in his amended counterclaim. Instead, he asserted only *procedural* due process challenges to the revocation of his overseas security clearance

The court of appeals in *Krc I* also correctly rejected petitioner's claim that he was deprived of a liberty interest without due process. Pet. App. 47a-48a; see *Paul* v. *Davis*, 424 U.S. 693, 708-710 (1976). As the court of appeals determined, that claim failed for two independent reasons. First, petitioner did not demonstrate a "loss of government employment sufficient to constitute a constitutionally cognizable change of status." Pet. App. 47a (internal quotation marks omitted). In fact, he was rehired by USIA in a domestic position at a higher salary the day after his Foreign Service appointment was terminated. Second, petitioner did not demonstrate that the USIA's actions damaged his reputation in a manner that interfered with his employment prospects. USIA's termination letter specifically stated that he was not disqualified from future domestic government employment. Moreover, petitioner had not presented any evidence in the record before the court in *Krc I*

(in Count III) and to the termination of his limited appointment (Count IV). See C.A. Appellant Public App. 245 (security clearance decision "was made without affording [petitioner] a statement of the reasons therefor or a fair opportunity to challenge the determination"), 246 (same allegation regarding termination decision). The court of appeals in *Krc I* correctly rejected petitioner's procedural due process claims, finding that USIA complied with applicable regulations by providing petitioner with notice of the impeding termination and by terminating him "on a ground expressly provided in its own regulations"—*i.e.*, that there was no need for his services. Pet. App. 50a; see *Sampson* v. *Murray*, 415 U.S. 61, 64 (1974). Furthermore, both the district court and the court of appeals addressed the rationality of USIA's actions in ruling upon petitioner's equal protection claim in *Krc II*. Pet. App. 8a-12a, 57a-59a. Thus, the courts below fully considered petitioner's procedural and substantive challenges to USIA's actions.

that the termination had actually affected his employment prospects. Finally, petitioner had not shown that USIA had published its finding that he constituted a security risk. Pet. App. 48a.[11]

4. Petitioner next contends that the court of appeals in *Krc I* erred in rejecting his claim that USIA's actions violated the APA and the Foreign Service Act. That contention is without merit.

The court of appeals properly relied on *Webster* v. *Doe*, 486 U.S. 592 (1988), to uphold the dismissal of petitioner's statutory claims. Pet. App. 44a-46a. In *Webster* v. *Doe*, this Court held that a decision by the Director of the Central Intelligence Agency to terminate an employee under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), was "committed to agency discretion by law" within the

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[11] In Count VI of his amended counterclaim, petitioner alleged that USIA interfered with his employment opportunities by reporting to the DISCO that it had "adverse information" about petitioner. C.A. Appellant Public App. 247-248. Although petitioner now characterizes this claim as based on the Due Process Clause (Pet. 18-19), he did not cite any constitutional or statutory provision in the counterclaim to support his interference claim. In any event, that claim was not before the court of appeals in *Krc I*, because it had not then been considered by the district court. Pet. App. 52a. On remand, the district court awarded summary judgment for USIA on the interference claim on the grounds that it was barred by sovereign immunity and, in the alternative, that USIA's answer to DISCO's inquiry was an accurate response that was authorized under USIA regulations. *Id.* at 59a-63a; see also 55 Fed. Reg. 31,963 (1990) (authorizing USIA to disclose "relevant data" to "duly authorized security officers of other agencies" regarding "significant security information in the file of a USIA employee"). The court of appeals in *Krc II* affirmed on the latter ground, Pet. App. 13a-14a, and petitioner's challenge to that ruling (Pet. 18-19) does not warrant further review.

meaning of 5 U.S.C. 701(a)(2) and therefore was not reviewable under the APA. 486 U.S. at 599-601. As the court of appeals determined, Section 611 of the Foreign Service Act, which authorizes USIA to terminate a limited appointment "at any time," 22 U.S.C. 4011, "imposes fewer shackles on the agency head's decisionmaking" than Section 102(c) of the National Security Act. Pet. App. 45a. Thus, as was true of the statute at issue in *Webster* v. *Doe*, the statute at issue here "'fairly exudes deference' to the Secretary [of State] when Foreign Service personnel decisions implicate national security." Pet. App. 45a, quoting *Webster* v. *Doe*, 486 U.S. at 600.

Petitioner errs in contending (Pet. 19) that USIA's discretion was constrained by the requirement in 22 U.S.C. 3905(a) that "[a]ll personnel actions" accord with "merit principles." As the court of appeals observed (Pet. App. 46a), the definition of "personnel actions" omits revocations or modifications of security clearance. 22 U.S.C. 3905(a). In light of that omission, it is doubtful that USIA's actions had to comply with merit principles. Moreover, the statutory prescription of merit principles does not expressly bar discrimination on the basis of sexual orientation. 5 U.S.C. 2302(b)(1). But even if such discrimination were implicitly barred by the statute, it would not help petitioner. As the court of appeals subsequently held in *Krc II*, petitioner was terminated because of his sexual conduct, not his sexual orientation. Pet. App. 8a-11a.

Finally, even if discrimination on the basis of sexual orientation were barred by merit principles, and even if petitioner's sexual orientation played some limited role in the revocation of his security clearance and the subsequent termination of his

limited appointment, it would not be appropriate on the facts of this case for a court to hold that USIA's actions violated those principles. As discussed above, there is no genuine dispute that USIA would have determined, without regard to petitioner's sexual orientation, that his conduct impaired his ability to "serve in assignments throughout the world," 22 U.S.C. 3901(a)(4), as members of the Foreign Service are required to do, and accordingly "adversely affect[ed] [his] performance." 5 U.S.C. 2302(b)(10). Under the circumstances of this case, as found by both lower courts, USIA's actions comported with merit principles.

5. Petitioner's final contention (Pet. 20-22) is that the court of appeals erred in holding in *Krc I* that the Foreign Service Grievance Board lacked jurisdiction to review his complaint. The court of appeals' holding was correct.

The Board plainly lacked jurisdiction to review the termination of petitioner's limited appointment. The USIA expressly premised the termination on Section 611 of the Foreign Service Act. See Pet. App. 94a, 104a; see also *id.* at 106a. Subsequently, the Board itself and the court of appeals found that the termination was indeed based on Section 611, and not on Section 610(a)(2) of the Act. Pet. App. 40a-41a, 106a. There is no basis for further review of that finding, and that finding compelled the conclusion that the Board lacked jurisdiction to review petitioner's termination. As the court of appeals stated, "the statute makes clear that a limited appointee who the Board finds was not terminated for misconduct—whose termination was properly classified under § 611—has no further remedy with the FSGB; such a termination is statutorily excluded from the 'grievances'

within the Board's jurisdiction." Pet. App. 41a-42a; see 22 U.S.C. 4131(b)(3).

The Board also lacked jurisdiction to review the security clearance decision that led to the termination of petitioner's limited appointment. That conclusion follows from *Egan*, in which the Court held that the MSPB lacked authority to review the security determination underlying removal of a government employee, even though it had authority to review the consequent removal. 484 U.S. at 525-534; see also *Cole* v. *Young*, 351 U.S. 536, 546 (1956) ("an agency head * * * should have the final say in deciding whether to repose his trust in an employee" by the grant of security clearance); *Hill* v. *Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir.), cert. denied, 488 U.S. 825 (1988) (MSPB lacked authority to review Air Force's suspension of security clearance).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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